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REPORTS

OF

20

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

LOUISIANA.

VOLUME XXIII.

FOR THE YEAR

1871.

J. HAWKINS,

REPORTER.

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1871.

Rec Mch. 4, 1872

J U D G E S
OF
THE SUPREME COURT.

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	}	<i>Associate Justices.</i>
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. W. W. HOWE,		

SIMEON BELDEN, *Attorney General.*

In Memoriam.

ZENON LABAUVE.

On the seventh of November, 1870, on motion of J. HAWKINS, Esq., the court adjourned out of respect to the memory of HON. ZENON LABAUVE, some time an Associate Justice of the Supreme Court of Louisiana, who had departed this life in the summer of that year.

JUDGE LABAUVE was born in the parish of West Baton Rouge, on the sixteenth of February, 1801. His father was a native of the parish of St. James; his mother was born in France.

In July, 1834, he was elected a member of the State Senate, and was re-elected in 1843 and in 1851. He was also a member of the Constitutional Convention of 1845, and was prominent on its judiciary committee.

He pursued the practice of law in the parish of Iberville with success; was also engaged in extensive operations as a sugar planter, and amassed a handsome fortune.

In March, 1863, he was appointed an Associate Justice of the Supreme Court under the Constitution of 1864, and sat on the bench until July, 1868, when the present court was organized.

He then returned to the practice of his profession and to his favorite pursuit of planting, in the parish of Iberville, where he died in his seventieth year.

Judge Labauve had an excellent judicial faculty, and an especial knowledge of the peculiar legislation and jurisprudence of Louisiana in respect to personal relations, the law of real estate, and the practice in succession cases. In his social relations he was remarkable for vivacity and humor, to a degree which would have surprised those who were accustomed to see him only on the bench. His unsullied integrity and his solid merit gave him a high reputation with the public, while his uniform kindness endeared him to all who had the pleasure of his personal acquaintance.

GEORGE R. KING.

The death of this eminent jurist, which occurred on the twenty-first of March, 1871, in St. Landry, the parish of his residence, was appropriately noticed at the succeeding June term of the Supreme Court at Opelousas, by a large public meeting of the members of the Bar and of the courts then in session at that place. Addresses were made and resolutions passed expressing in elegant and impressive language the high regard entertained by all for the memory of the deceased.

The late GEORGE R. KING was born in the Parish of St. Landry, and died in the sixty-fourth year of his age. He was an only son of Judge George King, for many years.

a prominent citizen of St. Landry. After a careful training in the best schools the country afforded, the subject of this brief memoir was sent to the University of Virginia, where he completed his academic education. He then entered the Law School of the University and prepared himself for the bar by attending the usual course of law lectures, his legal studies being aided and directed by Professor Lomax, a prominent jurist of Virginia. MR. KING married Miss Winn of Charlottesville, who is the survivor of the marriage, and mother of a daughter, the only child of Judge King living. Returning to Louisiana he entered upon a successful career in the practice of his profession. Subsequently, with much credit to himself and usefulness to the country, he filled various public offices. Among these may be mentioned that of Representative to the State Legislature, District Attorney, District Judge, and Associate Justice of the Supreme Court, organized under the State Constitution of 1845, and presided over by Chief Justice Eustis. His physical powers, never at any time robust, and impaired by long previous labors at the bar and on the bench of the District Court, he found inadequate to sustain him through the term for which he was appointed a member of the Supreme Court, and at the end of four years he withdrew from public service.

JUDGE KING was endowed with capacities that well fitted him for the judicial office. He had clear conception and fine discrimination. He deliberated with caution and reached conclusions only after mature thought and reflection. No man ever had a juster appreciation of the proprieties which attach to the functions of a judge or gave them a stricter observance.

In the retirement of private life his uniform kindness of disposition and his fine social endowments, combined with culture and refinement, attracted the esteem and attachment of all. The brief and expressive eulogium bestowed by the Roman bard upon Quinctilian may truthfully be applied to JUDGE KING: "His death was lamented by many good men."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

NEW ORLEANS

JANUARY, 1871.

JUDGES OF THE COURT.

HON. JOHN T. LUDELING,	<i>Chief Justice.</i>
HON. J. G. TALIAFERRO,	}
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. W. W. HOWE,	
	<i>Associate Justices.</i>

No. 1456.—SUCCESSION OF OCTAVE S. ROUSSEAU, deceased. On
Opposition to Tableau of Executrix.

23	1
45	100
23	1
49	666

The charter of the city of New Orleans of 1856 accords no privilege in favor of the city or the contractor on the property of a front proprietor for making a banquette or pavement on the street. Section 110 of the charter, which gives a privilege in favor of the city for assessments of taxes on the property assessed, has reference only to assessments regularly made in conformity with law, and can not be extended by implication to other burdens authorized to be imposed on the property within the corporate limits of the city.

In the distribution of the proceeds of an insolvent estate, when the proceeds of the sale of the personal effects are insufficient to discharge the general privileges, and the proceeds of the sale of the real estate which is mortgaged, are required to contribute, the proceeds of the mortgage which is least ancient, must first be applied, and so on, in regular succession, or until the privileges are discharged. This rule applies, whether the property mortgaged is situated in one or several parishes of the State; that is, if the mortgage on one piece of property, in one parish, is less ancient than that of another parish, it must first be exhausted before that of the other parish, of a prior date of registry, can be called upon, and the mortgage of the latter parish, of prior date, can only be called upon to make up the deficit.

APPEAL from Second District Court, parish of Orleans. *Thomas, J. Randolph, Singleton & Brown*, for executor, appellant. *Hornor & Benedict*, for John Coleman & Co., appellants. *Edward Bermudez* and *H. D. Ogden*, for estate of Dufossat.

TALIAFERRO, J. On the fifth of December, 1866, Aimee Rousseau, dative testamentary executrix of her deceased brother, filed a tableau and classification of the debts and claims against the estate, which is largely insolvent. Various oppositions were filed, but it is necessary to notice only two of these, which relate to claims for which privileges and priority of right are asserted upon the funds to be distributed.

The first of these is the opposition to the claim of Coleman & Co., of \$371 23, with interest, for paving, for which he claims a privilege on the proceeds of the house and lot formerly belonging to the succession, situated on Esplanade street, in New Orleans.

The other is that of Boisblanc & Dufossat, who represent mortgage creditors, opposing the application of the proceeds of the property, subject to their mortgage, to a pro rata distribution with those of the property subject to the mortgage of the executrix, to pay general privileges, there being no other fund out of which to pay them.

In amending the tableau and adjusting the claims bearing privilege and mortgage, the court below rejected the pretensions of Coleman & Co. to the privilege claimed for their debt, and subjected the proceeds of the property on which the mortgage of the executrix bore, to the payment of the general privileges, on the ground that her mortgage is the least ancient and first liable to the payment of general privileges in default of other funds to pay them. From this judgment Coleman & Co. and the executrix have appealed.

First—As to the claim of Coleman & Co. Under a contract with the city, they undertook to pave a part of Esplanade street. A house and lot on that street, forming a part of the succession of Rousseau, was mortgaged to E. S. Dufossat, and the claim of Coleman & Co. is for paving in front of that property, for which, they aver, the property was bound, and that the law accords them a privilege upon the proceeds to secure the payment of their claim. It is objected that the privilege, if it ever existed, was accorded by the act of 1840, and that, according to that act, it is prescribed.

The counsel of Coleman & Co. refer to the act of 1856, revising the city charter, section 110, to show that for assessed taxes upon city property a privilege is granted upon the property subject to the tax, and that the privilege so granted continues until the tax is paid. They refer to a clause in the contract between the city and Coleman & Co. to show a subrogation to the latter of all the rights of the city to seize and sell the property in case of non-payment of the bills for paving, and that the contractors were to collect the bills against the property holders for their part of the cost of paving.

We find nothing in the act of 1856, revising the city charter, which establishes a privilege to secure the payment of the cost of paving. Section 110 of that act declares, "that taxes, assessed under and by

Succession of Rousseau, deceased. On Opposition to Tableau of Executrix.

virtue of this act on the property, real or personal, of any person or corporation, are hereby declared to be a lien and privilege upon the said property, including stores of such persons or corporations, to date from the first day of March of the year for which they may be assessed, any alienation thereof or incumbrance thereon notwithstanding; and said lien or privilege shall exist, in favor of the city of New Orleans, for the respective amount of taxes assessed, until the same shall be fully paid; and the same shall be paid in preference to all mortgages and incumbrances other than taxes due the State." This seems to apply to the general annual tax founded upon assessment. Sections 119 and 120, after prescribing the conditions upon which paving and banquetting are to be made, declare that the cost of the same shall be paid by the owner or owners of real property in front of the pavements and banquettes so made, but establish no privilege upon the property to secure the payment of the cost incurred. The act of 1840, page 51, section 7, accorded a privilege of this kind, but the privilege continued only two years. If that act were still in force, the claimants could not avail themselves of it, for their claim would be prescribed. Their contract is dated ninth of May, 1860, and their paving bill was recorded in the mortgage office September 23, 1862.

Privileges being *stricti juris*, they can be recognized only in cases where they are clearly established by law. We think, therefore, the objection to the claim of Coleman & Co., as entitled to privilege, was properly sustained by the court. 4 An. 1; 11 Johnson, 80. See case of Rooney v. Broun, 22 An. 51.

Second—The contest between the two sets of mortgage creditors, in relation to the *onus* of discharging the general privileges, unprovided for from other sources.

The opponents, Boisblanc and Soniat, executors of Mrs. Lise Dufosse, show that their mortgage was executed on the twenty-second April, 1862, and registered the next day. The mortgage in favor of Miss Aimee Rousseau, the executrix, was executed on the nineteenth of March, 1866, and registered on the twenty-sixth of the same month. The first named mortgage bore upon the property of Rousseau on Esplanade street, in New Orleans; the last on a tract of land in the parish of St. Bernard.

It is strenuously held on the part of the executrix that these mortgages being upon different pieces of property, and situated in different parishes, are of equal rank, notwithstanding their execution at different times, and consequently the contributions, to be made to pay the general privileges, should be pro rata from the proceeds of both the city property and that in St. Bernard; that the article 3236 of the Civil Code has reference to different mortgages on the same object, and not to different mortgages, affecting different objects.

In prescribing the manner in which mortgaged property shall be discussed to pay general privileges, when such a contingency arises, we are unable to find that the law makes any distinction between mortgages, on the ground that some affect one piece of property, and others a different piece.

We find but the one rule laid down for enforcing on mortgaged property general privileges unprovided for, and that is to proceed first against the property embraced by the mortgage which is least ancient; if that is insufficient to pay the privileges, then the property affected by the mortgage which next precedes the one least ancient, is put in requisition, and so on, in regular gradation, through the entire series, or until the privileges are acquitted. The date determines the rank, *pro hac vice*, and this seems clear from the fact that no equality of rank is recognized, except in one single case, and that is where mortgages are of the same date.

Nor do we see the impropriety urged against this rule. A, owning several tracts of land, mortgages one of them to B. In looking to his security, B sees that, in the contingency of A's future insolvency and the possible retroaction of privileged claims against the immovable property of A, there are, between the property mortgaged to him and the privileges to be enforced, several parcels of unincumbered property, to be first proceeded against, before he could be disturbed. Now if, subsequently to B's mortgage, C should take a mortgage on these several immovables, and, in the event of a contribution by the mortgages to discharge general privileges, he should be allowed to come in, *pro rata*, with B, claiming that his mortgage is of equal rank with B's, and were sustained in the pretension, would not this be weakening B's security? In other words, could A, by granting the supposed mortgage to C, place B in a worse condition than he was at first? Besides, parties are presumed to contract in reference to the laws existing at the time of the contract. In the hypothetical case proposed, C would be presumed to know, when he accepted his mortgage, that, in the future, if general privileges should have to be enforced against the mortgaged immovables, the property subject to his mortgage would be first required to contribute, because his mortgage would be "the least ancient."

But, whether the rule we have been considering, be a wise and equitable one or not, is not for us to determine. We are unable to give it any other construction, and that is in unison with the views frequently taken by our predecessors. See 11 An. 482; 18 An. 142, 169 and 721.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs in both courts.

REPORTER—By an oversight, this case was placed among the list of unreported cases for 1859. See 21 An. 778, No. 1456.

No. 2849.—R. P. SMITH v. THE CITY OF NEW ORLEANS.

The notes issued by the city of New Orleans, known as city treasury notes, which, on their face, were made receivable for all debts and demands due the city, are not bills of credit within the meaning and intendment of section ten of article one of the Constitution of the United States.

The act of the General Assembly of 1869, authorizing the funding of these notes in interest bearing bonds of the city, was a ratification by the State which legalized their issue by the city. Therefore, any holder of such notes is entitled to recover the amount from the city, with legal interest, from judicial demand.

The prohibition contained in article one, section ten, of the Constitution of the United States, against the States emitting bills of credit, does not extend by implication to a municipal corporation of a State. The State, although prohibited from emitting bills of credit herself, may authorize a private or public corporation, within her borders and under her control, to do so. In the exercise of this prerogative by the State, there is no difference between the authorization granted to a private and a public or political corporation.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Alexander Walker and James Langan*, for plaintiff and appellee. *J. R. Beckwith*, City Attorney, for appellant.

TALIAFERRO, J. The plaintiff institutes this suit upon twenty-six written or printed instruments, each purporting to be an obligation of the city of New Orleans to pay the bearer a sum of money. Twenty-five of these are for the sum of twenty dollars each, and one for the sum of ten dollars, making in the whole, five hundred and ten dollars, and are of that class of paper currency, known as "city money." On each of these instruments or bills is the following endorsement:

"This note is issued in exchange for notes of the city of New Orleans, of smaller denominations, under and by virtue of ordinance No. 6250, approved October 12, 1864, and is receivable for all debts due the city of New Orleans, and for the redemption of the same the real estate of the city is pledged." The plaintiff claims interest also on the aforesaid sum from the first day of January, 1869.

The answer of the defendant repudiates, on several grounds, the instruments sued upon, and denies any indebtedness to the plaintiff. It declares that the supposed writings obligatory were not executed by the defendant; that no agent of the defendant now or heretofore ever had the power or right to execute them; and, if signed at any time by the persons whose names are affixed to them, such signing was unauthorized; that the defendant is itself without power or legal right to issue the instruments in question, and, *a fortiori*, could not delegate such right to its officers or agents; that these supposed obligations are in form bills of credit, and null and void by section ten of the first article of the Constitution of the United States, which declares, among the enumerated powers withheld from the States, that no State shall coin money or emit bills of credit. The answer denies that defendant has been put *in mora* by a demand of payment previous to the institution of this suit. The plaintiff had judgment

for the amount claimed, with legal interest from the first of January, 1869. The defendant has appealed.

As to the authority of the city to issue the bills in question, we find that the Legislature of the State, by an act approved twenty-seventh February, 1869, entitled "An act to enable the city of New Orleans to fund its floating debt, and to liquidate its indebtedness," authorized the city to issue bonds to the amount of three million dollars, to be "given in exchange at par for what is known as city notes." If the corporation had not been empowered by the legislative enactment to issue these city notes prior to the date of their issuance, we think this law of twenty-seventh February, 1869, ratified the act

The principal inquiry in this case is, are the instruments on which this action is founded, bills of credit, within the meaning and intendment of section ten of the first article of the Constitution of the United States, and therefore null and void?

A recognized definition of bills of credit, as the term is used in the Constitution of the United States, is thus given: "To constitute a bill of credit within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life." 11 Peter's Reports, page 426. The instruments or bills in question were not issued by the State, nor on the faith of the State, nor did they circulate on the credit of the State. They would seem, therefore, not to fulfill the conditions necessary to give them the character of bills of credit within the intendment of the Constitution. We imagine it is well settled that the Constitution does not prohibit private persons, or private partnerships, or private corporations, from issuing bills of credit. In the language of Judge Story, the Constitution does not prohibit the emission of all bills of credit, but only the emission of bills of credit by a State. The right to emit bills of credit is conceded to private corporations because under proper regulations and restrictions, which State Legislatures have always the power to impose, the exercise of the right may be useful in facilitating the business affairs of the community, and can never be productive of permanent or very serious injury. The States are the guards over the safety of the people against the perpetration of fraud by persons or corporations they invest with this power. But on the subject of currency a very grave question presented itself to the framers of the Constitution. The sad experience of the American people during the Colonial Government, and shortly after, justified them in appealing in the most earnest manner for protection against the unlimited power possessed by the States over the essential matter of the currency; a power fraught with dangers of the most frightful character, and from the injudicious exer-

cise of which ruin had spread over the land. It was seen by the convention, that, while the States were competent within their separate spheres to exercise a salutary control over the issue of bills of credit by corporations created by them, still the States themselves should be restrained in this respect from abuses which, it was fair to conclude, they would prevent the practice of by others. Hence it is by the organic law, that the States may, within circumscribed limits, authorize the issuing of bills of credit, while it is incompetent for them to exercise that power in their own names and on their own credit.

But it is urged by the counsel of the defendant, that the city of New Orleans is a public corporation, holding territorial jurisdiction over a portion of the territory of the State of Louisiana, and is an integral part of the State; that it is vested by the State with a portion of its sovereignty, and that it is by virtue of this derived sovereignty, that this public political corporation issued the bills of credit, for the payment of which it is now sued; that, the issuing of these bills of credit being the exercise of sovereign power derived from the State, the act is null and void for the reason, that the State, being forbidden to do the act, can not delegate the power to the corporation, on the principle that no one can delegate greater powers than he possesses. It is not easy to perceive a distinction in this respect between public and private corporations. If corporations of limited powers can exercise a right prohibited to the States, why may not public corporations exercise the same right when authorized by the acts incorporating them? Instances in which the power is granted to public corporations to issue bills of credit, are frequent, and the legality of their exercise of the power seems not to be questioned. In a case decided by the Supreme Court of New York, 39 Barbour 522, it was laid down that "A municipal corporation, having a power to purchase, has an implied power to incur an indebtedness for the purchase money and to provide for the payment of the indebtedness, unless that power is so restricted as that it can not be exercised, unless there be sufficient funds in hand to pay for the property. When no such restriction exists, it may purchase on credit and may issue its obligations to pay the indebtedness at a future time, and make subsequent provision for the payment of them."

The Supreme Court of the United States, in the case of *Moran v. Commissioners of Miami County*, 2 Black's Reports, 722, said: "The object of this court has been, in cases of a like kind, and it is still its purpose, to give to the contracts of counties, for the purchase of railroad stocks, and for borrowing money to aid in the construction of railroads and other internal improvements, a strict interpretation of the legislative acts, empowering them to do one or the other, but at the same time to give protection to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by

 Smith v. City of New Orleans.

counties, acting separately, against their efforts to be relieved from the responsibilities of official acts in putting such papers into circulation for capitalists to invest money in them on assurances that the principal and interest would be paid."

In the case of *Zabriskie v. Cleveland, Columbus and Cincinnati Railroad Company*, 23 Howard, the same court said: "Corporations are as strongly bound, as individuals are, to a careful adherence to truth in their dealings with mankind, and that they can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

Also, 21 Howard, 539, 24 Howard, 287, with regard to the putting in delay, the plaintiff insists that it was dispensed with by the public ordinance of the city, of the twenty-eighth December, 1868, which directed its Treasurer and Tax Collectors to receive in payment of taxes, licenses or any other duty no other than United States currency. The ordinance further directed the destruction by fire of all the bills known as "city money," then in its treasury. *Non constat* from anything in the ordinance, that the bills sued upon may not have been paid, had payment been demanded. We think, therefore, the defendant was not put in delay.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, so far as it decrees interest from the first of January, 1869, be annulled and reversed. It is ordered that the plaintiff recover from the defendant the sum of five hundred and ten dollars, with legal interest, from judicial demand and costs of suit

Rehearing refused.

NO. 3732.—THE STATE OF LOUISIANA v. JACOB MORNINGSTAR.

The fact that a person was called to serve as a talsman on a jury in a criminal trial, who had been exempted from serving on the regular panel, did not vitiate the jury. *Per curiam*: Such a juror might have served on the regular panel, if he had chosen to waive his exemption.

The counsel for the accused asked the judge to incorporate in his charge to the jury certain extracts furnished from decisions, to which the judge informed the jury that he had already given to them the substance of the extracts referred to as law. Held—That the reasons, given by the judge for not giving the charge, were sufficient.

APPEAL from the Second Judicial District Court. *Pardee, J.* *Z. McKay*, District Attorney, for appellee. *R. L. Preston*, for appellant.

LUDELING, C. J. The defendant was indicted for the murder of Alex. Wright on the twenty-fourth day of March, 1869; he was tried and convicted of murder without capital punishment, and he has appealed to this Court.

State v. Morningstar.

The first bill of exceptions is, that persons who were exempted from jury duty, were drawn as jurors on the venire and that this fact vitiates the whole panel.

The law requires that the jury shall be drawn from the list of registered voters. Acts of 1868; No. 110, p. 142.

This seems to have been done. If from this list of registered voters the names of persons, who are exempt, were drawn, that fact could not affect the legality of the drawing—nay, the exempted persons might have served as competent jurors, if they had chosen to waive their exemption.

The second bill of exceptions was to the refusal of the judge to incorporate in his charge certain extracts from the cases of the State v. Chandler, 5 An. 490, and Camonche v. Baris, 6 An. 97.

The judge states that he informed the jury that he had already given to them the substance of the extracts referred to as law. We think that was sufficient.

It is therefore ordered that the judgment be affirmed with costs of appeal.

No. 2942.—SUCCESSION OF ROBERT GAMBLE. Contestation between Legatees under the Will.

A pew in a church, being attached to the realty, is of the character of an usufruct, and must be classed as an incorporeal immovable. C. C. 470.

Notes, given for the rent of real estate, do not partake of the realty, and are, therefore, not to be classed as a part of the realty. Therefore a legatee, entitled to all the testator's estate, except real estate, will take the rent notes or their proceeds, while the legatee, entitled to the real estate, will take the pew in the church, that being classed as a part of the realty.

A PPEAL from Second District Court, parish of Orleans. *Duvigneaud, J. A. L. Tissot*, for Mary Gamble, opponent and appellant. *Clark, Bayne & Renshaw*, for Mrs. Amanda L. Gamble and others, opponents and appellants. *E. Filleul*, for Thomas Robertson, executor and appellee.

TALIAFERRO, J. The testator lived in Illinois at the time of his decease. He left a considerable estate, both in Illinois and in Louisiana. His debts were few and inconsiderable. He died without heirs either in the ascending or descending line. He gave by his will to his wife the family residence and some other lots of ground in the town of Bunker Hill, in Illinois, and directed his executors to pay over to her six thousand dollars out of the proceeds of his real estate in New Orleans, which, with the exception of a few lots, made the subject of special legacies, he directed to be sold. He also made to her a further donation in these words: "Also all my personal property, of what-

ever name or nature soever, intending this bequest to include every thing of which I am now possessed, except real estate."

After directing several legacies of a particular kind, the testator concludes the disposition of his property as follows: "I give and bequeath unto my sister, Mary Gamble, all the remainder of my property, not hereby otherwise disposed of, of every name, nature and kind whatsoever." Three executors were appointed, two of them citizens of Illinois, the other a citizen of Louisiana. The executor in Louisiana made an inventory of the property of the succession in this State, had the real estate sold, that was required to be sold by the will, and filed a final account and a tableau, by which he proposed to pay the creditors and legatees. As part of the property of the succession, six several promissory notes, each for the sum of \$350, were placed on the inventory. These notes were for the rent of property in New Orleans, and appear in the account in the form of two judgments in which they were merged, one for the sum of \$1750 and interest, and the other for \$875 and interest. There was also entered upon the inventory a pew in Christ Church. The executor placed, among the debts of the succession, the sum of \$2624 52, alleged to have accrued in Illinois, and, as was shown, allowed by the Probate Court of the county in which the testator had lived, and in which his estate in Illinois was opened. The controversy in this case has arisen in relation to which of the two legatees, under universal titles, the wife or the sister of the testator, the pew and the proceeds of the rent notes are to be distributed, and in regard to the admission of the debts from Illinois, as charges against the succession in this State. The pew and the proceeds of the rent notes were treated by the executor as real estate, and assigned to Miss Mary Gamble as part of her legacy. An opposition was filed on her part to the payment of the claims, allowed in Illinois, on the ground that they are not owing by the succession. On the part of Mrs. Amanda L. Gamble, an opposition was filed, claiming that under the provisions of the will, she is entitled to the pew and to the proceeds of the notes in controversy as personal property, and praying judgment accordingly. There was also an opposition filed by the sheriff, claiming costs against the succession to the amount of thirty dollars, which the executor had omitted to place on the tableau.

A mass of testimony was taken in Illinois, under commission, in regard to the several claims, amounting to \$2624 52 and transferred to this State for payment. The court dismissed the opposition of Mrs. Amanda Gamble, sustained that of the sheriff and that of Miss Gamble, except as to two items, the one for \$1000, an attorney's fee, and the other for \$150, a medical bill. As thus amended, the court rendered judgment, homologating the tableau and ordering that the funds

Succession of Gamble. Contestation between Legatees under the Will

be distributed in accordance therewith. From this judgment Mrs. Amanda Gamble has appealed.

The principal questions arising in this case are :

First—Is the widow of the testator entitled under the will to the pew and the proceeds of the notes originally given for the rent of real estate ?

Second—Can the Illinois debts be legally acquitted out of the funds arising from the sale of the testator's property in Louisiana ?

The right to the use of a pew has been defined to be an incorporeal interest in the property. In a few of the States of this Union, pews are considered as real estate ; in others as personal property. In the State of New York the precise nature of such property does not seem to be well settled. We incline to apply in this case the rule laid down in article 470 [462] of our Code. "Incorporeal things, consisting only in a right, are not of themselves strictly susceptible of the quality of movables or immovables ; nevertheless, they are placed in one or the other of these classes, according to the subject to which they apply and the rules hereinafter established." The right, therefore, being of the character of usufruct, in as much as it applies to an immovable, we consider it an incorporeal immovable. The pew then was properly assigned to Mary Gamble, as it is embraced by that clause of the will in which the testator declares: "I give and bequeath to my sister, Mary Gamble, all the remainder of my property, not hereby otherwise disposed of, of every name, nature and kind whatsoever."

The rent notes, it is argued, being for the revenue derived from the rent of the real estate, partake of the realty, and should go with the real estate to the legatee receiving it or its proceeds. We can not adopt this view of the character of the notes. Article 474 [465] of the Civil Code describes as movables "obligations and actions, the object of which is to recover money due or movables, although these obligations are accompanied with a mortgage." Article 475 [467]: "All things, corporeal or incorporeal, which have not the character of immovables by their nature, or by the disposition of the law, according to the rules laid down in this title, are considered as movables." Promissory notes have not the character of immovables by their nature or by disposition of law, and they must be taken as personal property. Such instruments are sold every day and pass by indorsment or delivery. They are good in the hands of any holder acquiring them in good faith. Their character of personalty is not changed by the consideration for which they may have been given. The counsel of Miss Gamble aims to show that the testator treated his Illinois and Louisiana estates in accordance, as the counsel contends, with the statute of Louisiana, and would seem therefore to infer that the bequest, to Mrs. Gamble, of all the testator's personal property should be limited to the personal estate in Louisiana.

Without adverting to the universally received maxim, *mobilia sequuntur personam*, the legal fiction which locates all the personal property of the testator wherever situated, at his place of residence, and subjects it to the law of his domicile, the language used by the testator is too broad, distinct and clear to admit of such a construction. After disposing of his houses and lots in favor of his wife, the testator adds: "Also, all my personal property of whatever name or nature soever, intending this bequest to include every thing of which I am now possessed, except real estate." This, unquestionably, embraced and included the promissory notes in question. In regard to the debts of the testator in Illinois no law prohibits their payment, when duly proved, out of funds of his estate in Louisiana. Even under the bankrupt laws, both of Great Britain and the United States, foreign creditors are permitted to prove their claims and participate in the assets surrendered by the bankrupts. And where a debtor dies insolvent, leaving property in different countries, and separate administrations are taken out, this, perhaps with some limitations, is no bar to the right of all the creditors to participate in the distribution of the entire estate. But the complications and difficulties that frequently arise in regard to the adjustment and settlement of the claims of creditors, residing in different countries, in cases of insolvent estates, where part of the assets are in one country and part in another, and are under different administrations, principal and ancillary, do not arise in this case. The succession of Gamble was not burdened with debts. The liabilities were few and of but little importance, compared with the value of the property. The succession is amply able to pay all the creditors of the testator, wherever their domicile. There is then no good reason, why the executor in Louisiana may not pay the foreign creditors on sufficient proof, before our courts, of the legality and correctness of their claims. The claims that have been presented here and admitted by the executor, have been opposed and strictly scrutinized. Testimony in relation to them has been taken in Illinois under commission. More than one-half these claims, in amount, were rejected by the court below. Two only were admitted; the fee of the attorney, Walker, one thousand dollars, and a medical bill, amounting to one hundred and fifty-one dollars. The action taken by the lower court on these claims we think correct. The judgment must be altered in regard to the disposition of the promissory notes taken for the rent of real estate in New Orleans.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court, dismissing the opposition of Amanda Gamble, be annulled, avoided and reversed, so far as relates to her claim therein set up to the rent notes figuring on the tableau of the executor in the form of two judgments. one for the sum of \$1750 with the interest.

Succession of Gamble. Contestation between Legatees under the Will.

the other for the sum of \$875 with interest. It is further ordered and adjudged that the said two judgments or their proceeds be decreed to be the property of the said Amanda Gamble, widow of the testator; that the executor amend his tableau accordingly and pay over the proceeds of the said judgments to the said opponent. It is further ordered and adjudged that the judgment of the District Court, as herein altered and amended, be affirmed.

Rehearing refused.

No 2992.—JAMES O. NOYES v. SIGMUND LOEB.

This is an action to annul a judgment of the Sixth District Court of the parish of Orleans.

The defense is that the petition disclosed no cause of action. The petition alleges that the plaintiff, availing himself of the absence of defendant's counsel at the trial, obtained the judgment by fraud and ill practice and by suppressing the truth well known to the plaintiff. The court *a qua* sustained the exception and dismissed the suit. The plaintiff in the action of nullity appealed. Held by the Supreme Court—That the allegations of the petition, being taken as true for the purpose of trying the exception, disclosed a cause of action, and, therefore, it must be overruled and the cause be remanded, with instruction to the court *a qua* to be proceeded with according to law.

A PPEAL from the Sixth District Court for the parish of Orleans. *Cooley, J. H. B. Kelly*, for plaintiff and appellant. *B. R. Forman*, for defendant and appellee.

LUDELING, C. J. This is an appeal from a decision sustaining an exception to the petition "for insufficiency and uncertainty, and because no specific acts of fraud are set forth, such as would authorize the remedy sought, and disclose no cause of action."

For the purpose of the trial of the exception, the allegations made in the petition are admitted to be true. They are as follows: That the plaintiff, Noyes, gave to Simon, Loeb & Co., for value received, his note, payable to their order, for \$1791 09, dated on the fourth and payable on the tenth of April, 1865; that the original payees continued to hold the note until the ninth of December, 1867, at which time it was surrendered by them in bankruptcy; that, between the maturity of the note and its surrender in bankruptcy, it had been reduced by payment to \$790 09, and that, when surrendered by Simon, Loeb & Co., they only claimed that balance to be due; that on the seventeenth of February, 1866, prior to said surrender, the said Simon, Loeb & Co., in consideration of the conveyance by Noyes of all his property to a trustee for the benefit of said Simon, Loeb & Co. and other creditors, had granted him a full and unconditional release and acquittance from all liability on account of said note or any other account; that the note had thus been extinguished by payment, except as to \$790 09; and that, as to this balance, Noyes had been released from all liability, as aforesaid, on the seventeenth February, 1866. It is further alleged that Sigmund Loeb, well knowing the truth of all the facts above

Noyes v. Loeb.

alleged, corruptly and fraudulently combined and confederated with said Simon, Loeb & Co. to defraud Noyes by means of suit No. 1165, instituted in the Sixth District Court on the fourteenth of February, 1870, alleging, in the petition filed in said suit, that he was the holder and owner of the note, for valuable consideration, in due course of business, before maturity, and that the whole amount was still due and unpaid, he well knowing the falsity of all of said allegations.

It is further alleged that Sigmund Loeb, well knowing that the note had been extinguished by payment and release, as aforesaid, corruptly and fraudulently combined and confederated with Simon, Loeb & Co. to defraud Noyes by means of said suit, 1165, and by availing himself of the accidental absence of Noyes' counsel on the trial, obtained a judgment by fraud and ill practice and by suppressing the truth well known to plaintiff.

We can not assent to the proposition that no cause of action is stated in the petition. It would be a reproach to any system of laws to say, that it was inadequate to afford relief upon the state of facts admitted by the pleadings in this case. The law of this State is not liable to such imputation. Article 607, Code of Practice, declares that "a definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it was rendered." 12 La., *Fox v. Bonner*. 408; 7 N. S., 692; *Beauchamp v. McMiken*; *Chitty on Bills*, p. 212.

It is, therefore, ordered that the judgment of the district court be annulled; that the exception be overruled; that the case be remanded to the court *a qua*, to be proceeded with according to law, and that the appellee pay the costs of appeal.

No. 2924.—STATE OF LOUISIANA v. ALBERT PUSH.

A juror who does not speak or understand the English language, may be challenged by the State, and excluded by the judge, although he be a qualified elector and possess all the legal requisites to constitute him a good juror. The accused is not deprived of any right or privilege by excluding him from the panel.

A juror who does not understand the language in which the proceedings are conducted, is as much an unfit person to sit on the trial, as though he was infirm, or incapable of rendering such services; and the State, as well as the accused, may have him excluded by challenge for cause.

A PPEAL from the First District Court of the parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State. *A. G. Semmes*, for defendant and appellant.

Howe, J. The defendant has appealed from a judgment by which he was sentenced to imprisonment at hard labor for the crime of forgery. The only point presented is by a bill of exceptions to the

action of the judge below in sustaining a challenge for cause made by the State to a juror who did not understand the English language, but only German.

We do not think the court erred in excluding such a juror, and we find it difficult to imagine of what right or privilege the prisoner was deprived by such a ruling.

It is insisted by counsel that the juror was a qualified and registered voter, and, as such, a qualified juror; and that, therefore, the prisoner was entitled to have him sit upon the trial of this cause. It must be remembered, however, that, while all jurors must be qualified electors, all qualified electors are not necessarily qualified jurors in a particular case. A challenge for cause may exclude many jurors, otherwise embraced in the general terms of the law. Thus, a qualified elector may be challenged *propter affectum*, by reason of some supposed relationship, bias, or partiality, or previous formation and expression of opinion. A qualified elector may be challenged *propter defectum*, as if he be an idiot or lunatic, though not interdicted; or if he be laboring under an attack of *mania a potu*; or if he be blind, in a case requiring an inspection of writings; or if he be deaf, or deaf and dumb. This right to challenge for cause does not spring from any especial provision of law, but from the general rule that the method of trial shall be according to the common law. R. S. 1870, § 976; Archbold, vol. 1, p. 548

Now a person who only understands German, and does not understand English, is no more capable of sitting as a juror in the First District Court of New Orleans, where the proceedings are conducted entirely in English, than if he were deaf and dumb. The accused might desire him, it is true; for such a juror would always be bound to acquit, inasmuch as he could never be satisfied beyond a reasonable doubt of the guilt of the accused; but this very desire, if founded on such a reason, is one that can not properly be gratified. The State has some rights in a criminal court; and among them is certainly the right to have a jury composed of men who understand the language in which are conducted those proceedings by which, against the presumption of innocence, she seeks to establish a conviction of guilt.

The juror in this case had, it is true, the general qualifications named in the law. R. S. 1870, § 2125. He was "a duly qualified elector." He was properly summoned and was bound to appear. But this does not deprive the State of the right to challenge for the cause assigned in this case, any more than in a case where a juror is a deaf mute. The right springs from the necessity of things and the general rule that the proceedings in criminal courts of this State shall be according to the common law

The case of *Gay v. Ardry*, 14 La. 288, a civil case, can not control the right of the State in a criminal prosecution.

We may observe that the statute, now in force relative to juries, seems to recognize the want of ability to understand the proceedings, from whatever cause, as an exemption, by exempting persons "who may be infirm or *incapable of rendering such services.*" R. S. 1870, § 2126. It is true that a reason for exemption is no ground for challenge, § 2131, but it is likely that the judge might have excused this juror without giving the prisoner any right to complain.

Judgment affirmed

Rehearing refused.

3071.—STATE OF LOUISIANA v. VICENTE LEMODELIO.

Evidence to show that a translator, selected to interpret the testimony of witnesses who testify in a language not understood by the counsel, the court or the jury, is incompetent, can not be admitted after verdict, on a motion for a new trial. The objection is too late, if not made during the trial.

A PPEAL from the First District Court of New Orleans. *Abell, J. Simeon Belden*, Attorney General, for the State. *Sambola & Ducros*, for defendant and appellant.

TALIAFERRO, J. The defendant was convicted of the crime of manslaughter, and sentenced to imprisonment at hard labor in the penitentiary for the term of five years. He has appealed. After the verdict of the jury was rendered, the defendant moved for a new trial on various grounds, the chief of which is the refusal of the Judge on the trial of the motion to receive evidence alleged by defendant to have been discovered after the trial had taken place, and which was offered to show the incompetency of the translator employed by the court to translate correctly the evidence of three witnesses, who testified on the trial of the case in a language not understood by the court, the counsel or the jury.

The case comes before us on a bill of exceptions to the ruling of the court rejecting the evidence offered to show this alleged incompetency of the translator. Embodied in the bill of exceptions are the reasons assigned by the judge for excluding the testimony. These are, "that the translator was called in this case at the instance of the defendant's counsel and accepted by the attorney general, and throughout the examination exhibited a full knowledge of the language of the witnesses, and, there being no objection raised either by the accused, who understood the language of the witnesses, or his counsel, to the competency of the translator, the court deemed it too late, upon a motion for a new trial, to inquire into his competency."

We think the court properly refused to admit the evidence. It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

 Succession of Lydia Robinson, deceased wife of John McClean.

No. 2402.—SUCCESSION OF LYDIA ROBINSON, deceased wife of John McClean.

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124	230
124	233

If a judgment has been rendered by a competent court, adjudicating community property to a surviving spouse, and neither fraud nor spoliation is shown, its correctness can not be inquired into collaterally.

The mortgage creditor whose registry has the priority of date, is entitled to be paid first out of the proceeds of the sale of the mortgage property.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Budd & Grover* and *Breaux & Fenner*, for appellants. *G. Schmidt*, for appellee.

WYLY, J. In 1864, Lydia Robinson, wife of John McClean, died, leaving three minor children and a succession consisting only of her share of the community property. Her surviving husband was appointed natural tutor, and as such administered her succession.

On the twenty-first of October, 1867, the minors' share of the community property was adjudicated to their natural tutor, John McClean, at \$5806 73, being the estimated value of half the community property, after deducting the community debts. To secure to the minors the sum due them under this adjudication, John McClean gave a special mortgage in due form, on twenty-fifth February, 1868.

On twenty-first May, 1868, Henry Bitters, claiming to be a creditor of the succession of Lydia Robinson, on account of a debt due him by the community which existed between her and her surviving husband, John McClean, instituted a proceeding under articles 993, 994 and 1057 of the Code of Practice, and obtained a writ of sale, under which all the real estate belonging to the community was sold, except that specially mortgaged to the minors.

The proceeds of this sale, to wit: \$4444, form the subject of the present controversy.

Morris, Wheeler & Co. claim to be paid out of this fund, on the ground that they are creditors of this succession, because their debt was also a debt contracted by the community of which the deceased was a member. J. Dejean also filed an opposition to the application of this fund to these creditors of the succession on the ground that the proceeds do not belong to the succession of Lydia Robinson, being the price of the sale of the individual property of John McClean, upon which a judicial mortgage existed in his favor for the sum of \$7087.

The court below maintained the rule of Dejean, and gave judgment in his favor for all the funds, after deducting the sheriff's costs.

From this judgment Henry Bitters and Morris, Wheeler & Co. have appealed.

The first question to consider is, was the adjudication of the property to John McClean an absolute nullity or not? If it was an absolute

Succession of Lydia Robinson, deceased wife of John McClean.

nullity, of course the property sold belonged to the succession of Lydia Robinson, and her creditors are properly before the court demanding its proceeds.

If, on the other hand, it be not an absolute nullity, the property at the time of the sale did not belong to the succession of Lydia Robinson, and there are no funds of her succession to be distributed among her creditors.

There is no fraud or spoliation shown to have been practiced in obtaining the adjudication, and it was rendered, by a court of competent jurisdiction, on the advice of a family meeting.

We think the judgment was not an absolute nullity, and that it can not be attacked collaterally.

In *Sanders v. Carson, Administratrix*, 2 An. 394, it was held that the correctness of a judgment, adjudicating community property to a surviving spouse, rendered by a court of competent jurisdiction, in the absence of any proof of fraud or spoliation, can not be inquired into collaterally.

It has not been questioned in this case by a direct attack.

The adjudication therefore transferred the property to John McClean. The creditors of the succession of Lydia Robinson have nothing whatever to do with the funds derived from the sale of John McClean's property. He has not complained of the illegality of the sale; and the question is, whether J. Dejean has a greater right to the funds than Henry Bitters or Morris, Wheeler & Co., all being creditors of John McClean.

The judgment of Dejean was recorded prior to that of Morris, Wheeler & Co., and Henry Bitters does not appear to be a mortgage creditor.

We think Dejean, having the first mortgage on the property sold, is entitled to the funds.

Judgment affirmed.

No. 3085.--LOUIS TREGRE *v.* O. BAUDRY—A. MILTENBERGER,
Warrantor.

A defendant, who has allowed his lands to be seized and sold to pay his debts, can not afterward maintain a petitory action, for the recovery of the lands, against the purchaser, at judicial sale. Being divested of title himself by the sale, he is estopped from setting up his title against the purchaser.

APPEAL from the District Court, parish of St. John Baptist.
A Bauvais, J. Charles Lonque, for plaintiff and appellant. St. Maurice Berault, Legendre & Poche, for defendant and appellee.

HOWELL, J. This is a petitory action by Louis Tregre against Omer Baudry, the overseer and manager of A. Miltenberger, called in war

Tregre v. Baudry—Miltenberger, Warrantor.

ranty, for a plantation situated in the parish of St. John the Baptist. The facts, necessary to an understanding of plaintiff's demand, are as follows: A. Miltenberger & Co., of which firm the warrantor is a member, obtained judgment in the United States Provisional Court for Louisiana against Louis Tregre for about \$80,000, with a recognition of mortgage, and caused the property claimed in this suit to be sold, and, at the sale on third June, 1865, A. Miltenberger became the purchaser for \$27,000 cash, and has ever since held it. Tregre, the defendant in that suit, simply alleges in his petition, in this that he is the owner of the said land and improvements, by virtue of acts of purchase long prior to said suit, and that the defendant, Baudry, has, without authority, taken possession thereof, and claims as owner. We are unable to understand how plaintiff can recover. The title set up by him was divested by the sale in the above named suit, and, being the defendant therein, he is estopped from setting up his said title against the purchaser, warrantor in this action.

Judgment affirmed.

No. 3098.—HEIRS OF J. B. P. BOURGEOIS v. THEOPHILE THIBODAUX.

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52 592

In a deed to a tract of land appeared the following clause: "The said purchaser reserving to himself the right, after having effected the payment of the first sixth part, to postpone the payment of the last five-sixths from year to year, indefinitely, in consideration of an annual interest of ten per cent. from the maturity of the respective sums or terms, whose payment shall be thus postponed, which interest shall be exigible from year to year. In default of payment promptly, the whole capital to be exigible, as if there had been no stipulation for that delay." Held—That the stipulations in the act or deed, postponing payments on the five-sixths indefinitely, on condition that ten per cent. interest was paid annually and the other conditions did not change the character of the act from that of a sale to that of a contract of rent, and, therefore, the vendor could not maintain an action for rent on the deed, in case the conditions were not promptly complied with.

APPEAL from Third District Court, parish of Lafourche. *Gates, J. Taylor & Beattie*, for plaintiffs and appellees. *Bush & Goode*, for defendants and appellants

WYLY, J. In 1839, J. B. P. Bourgeois conveyed to Charles Aubert a tract of land in the parish of Lafourche for \$12,000, payable in six installments during the month of March of each of the years 1840, 1841, 1842, 1843, 1844 and 1845, with the following stipulations stated in the deed, to wit: "The said purchaser reserving to himself the right, after having effected payment of the first sixth part, to postpone the payment of the last five-sixths from year to year, indefinitely, in consideration of an annual interest of ten per cent. from the maturity of the respective sums or terms whose payment shall be thus postponed, which interest will be exigible from year to year, and, in default of its prompt payment, the whole of the capital will be exigible, as if there had been no stipulation for that delay. For the security of

which payments and eventual interest, the property hereby sold remains by special privilege affected, bound and mortgaged."

* * * * *

"Before the signature of these presents, it has been agreed that it shall be lawful for the purchaser to pay by anticipation the price of the present sale, notwithstanding the stipulation as to time aforesaid, the said Mr. Aubert having the right to a discount at the rate of ten per cent. per annum for each payment made by anticipation."

The sum of \$6000 of the principal of said consideration has been paid, and also all the interest due up to the thirty-first day of March, 1861, leaving still due the sum of \$6000, and ten per cent. per annum interest thereon from the month of March, 1861.

The defendant in this suit purchased the property under a judgment against the vendee, Charles Aubert.

The plaintiffs allege that by virtue of the said conveyance to Charles Aubert, a perpetual charge was imposed upon said tract of land for the payment of the said ten per cent. per annum interest, and that said incumbrance follows it into whose hands the said property may pass. They allege that six years of said ten per cent. interest are due, amounting to the sum of \$3600, which they have amicably demanded of the defendant.

The prayer of the petition is, that the defendant be cited to answer, "and, after legal delays and due proceedings had, that said tract of land, its improvements and appurtenances be sold to satisfy said sum of three thousand and six hundred dollars, with recognition of the charge, incumbrance, privilege and mortgage, as aforesaid; and for general relief."

The defendant avers in his answer that at sheriff's sale, in 1866, he became the purchaser of the property; that at said sale the sheriff read a certificate of mortgages, showing the superiority of the mortgage under which the sale was made to him, and also showing that said land was not subject to the charge or incumbrance claimed by the plaintiffs; that the deed declared on by the plaintiffs, was, in truth and in fact, a sale from the father of the plaintiffs to Charles Aubert, as intended and interpreted by the parties; and that the principal demand of the plaintiffs is barred by the prescriptions of one, three, five, ten and twenty years, and the accessory demand, to wit: the mortgage and vendor's privilege have perempted by the lapse of ten years without reinscription and by the extinguishment of the principal obligation, which in prescriptions and peremption the defendant specially pleads.

The court gave judgment in favor of the defendant, and the plaintiffs have appealed.

The question is, what is the character of the instrument declared on; is it a contract of sale or is it a rent charge?

If it be a contract of sale, the defendant is not liable because he was not a party to the act, and if the mortgage has perempted by the failure to reinscribe it within the ten years, the right to the hypothecary action does not exist in favor of plaintiffs against the defendant, as third owner and possessor of the mortgaged property. Indeed, the plaintiffs have not sought in this action to foreclose the mortgage on the property. The demand is simply to have the property subjected to a rent charge, which the plaintiffs claim to exist in their favor by reason of the deed declared on, and to cause it to be sold to pay the sums alleged to be due for rent since thirty-first day of March, 1861.

An examination of the deed satisfied us that it is not a contract of rent; it is simply a sale with a potestative condition, whereby the purchaser acquired the right either to defer the payments, after the installments matured, by paying ten per cent. per annum interest, or to pay by anticipation the price at ten per cent. discount on each of the installments so paid by anticipation. But the purchaser was bound to pay the first installment before he could postpone the others from year to year by paying the ten per cent. interest. And it was specially stipulated in the deed that, "in default of the prompt payment of the interest annually, the whole of the capital will be exigible, as if there had been no stipulation for that delay." The moment, therefore, there was a failure to pay the interest, the whole debt became due—the deed stood as though there had been no stipulation for the delay.

Can an instrument with such features be regarded as a contract of rent? "The contract of rent for lands is a contract by which one of the parties conveys and cedes to the other a tract of land or any other immovable property, and stipulates that the latter shall hold it, as owner, but reserving to the former an annual rent of a certain sum of money or of a certain quantity of fruits which the other party binds himself to pay him." C. C. 2750.

"It is of the essence of this contract that it be made in perpetuity." C. C. 2751.

In the instrument before us, we do not see the essential requisites of the contract of rent. The land is ceded and conveyed to the purchaser, but we do not see that it is made *subject perpetually* to the payment of "an annual rent of a certain sum of money or quantity of fruits," as required by the articles of the Code to which we have referred. In the succession of Canonge, 1 An. 210, the question was before the court, and it was held, that "it is of the essence of the contract that it conveys the property in perpetuity; that the rent reserved is a charge imposed upon the property itself, which is inherent in it, to which it is *perpetually subject*, and which follows it into whatever hands it may pass." C. C. 2752, 2758, 2763.

 Heirs of Bourgeois v. Thibodaux.

Can it be said of a party who has already received half the price of the sale of his land, and who had a cause of action to recover the other half on the thirty first of March, 1862, when the condition for extension of payments was violated, that he stands before the court on the deed which gave him these rights, not as a vendor, but simply as a renter of ground? The proposition is too plain for argument.

Let the judgment of the court below be affirmed, with costs.

No. 2873.—SUCCESSION OF MILTON TAYLOR.

A dative testamentary executor, who has been appointed, according to the laws of another State of the Union, in place of the executor named in the will, who declines to serve, can not be appointed dative testamentary executor to administer property of the succession situated in this State. In such a case the public administrator for the parish where the property, belonging to the succession, is situated, must be appointed to administer it. Revised Statutes of 1870, section 3677.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. D. C. Labatt and J. Aroni*, for appellants. *Hays & New*, for appellees.

WYLY, J. This is a contest for the office of dative testamentary executor of the last will of Milton Taylor, deceased.

On the thirtieth March, 1870, John J. Rickey applied for the appointment of dative testamentary executor, alleging in his petition that Milton Taylor, late of Kentucky, died in Cincinnati, Ohio, leaving his will, which was probated on the twenty-sixth November, 1869, in the probate court of the county of Hamilton, State of Ohio, and that he was there appointed dative testamentary executor, the executor named in the will having declined to act. The prayer of his petition is, "that the will annexed be duly admitted to probate; that after due notice he be appointed and confirmed as dative testamentary executor of said succession, and that letters issue to petitioner according to law." * * * * *

On the same day the will was admitted to probate and ordered to be executed by the Second District Court, parish of Orleans, and the application for letters of dative testamentary executorship was ordered to be advertised according to law.

The public administrator of the parish of Orleans, appointed under act No. 87 of the acts of 1870, intervened and was appointed dative testamentary executor by the court on the eighth of April, 1870.

Thereupon the counsel for the foreign dative testamentary executor moved to set aside the order, appointing the public administrator, on the following grounds:

First—That the applicant herein was duly appointed and sworn dative testamentary executor of the last will of the deceased by the probate court of a sister State, and is here present, praying to be

Succession of Taylor.

recognized and confirmed as such under the comity of States and the Constitution of the United States; and that this succession is not contemplated or embraced by the provisions of the act, appointing a public administrator, and his interference therein is not authorized by law.

Second—That the provisions of the said act must be construed strictly, being in derogation of common right, and were clearly intended to apply to cases, where there was no one willing to act as executor; that it was not intended to, and does not, impair the right of foreign executors to be recognized, as they have the right to be under the settled jurisprudence of this State.

Third—That the act of the Legislature and the appointment of the public administrator are subsequent in date to the decease of the testator and the appointment of the applicant herein by the probate court of a sister State, and can not be retrospectively interpreted so as to interfere with his administration of an ancillary succession.

The court refused the motion to set aside the appointment of the public administrator, and the foreign dative testamentary executor has appealed.

An examination of the Statute of 1870, "providing for the appointment of public administrators and defining the duties of the same," and an examination of the record satisfy us that the district judge decided the case correctly.

The third section of the act referred to provides: "That in all testate successions, when, from any cause, the executor can not discharge the duties of his office, the judge shall appoint the public administrator of the parish dative testamentary executor."

The ninth section repeals all laws on the same subject matter inconsistent with this law.

The application of the foreign dative executor shows that the executor named in the will has refused to act. It is, therefore, a testate succession, for which the law, in precise terms, has appointed a legal representative.

Where a person dies, leaving property in two or more States, his property in each State is considered a separate succession for the purpose of administration, the payment of debts and the decision of claims of parties asserting title thereto; and the power of administrators, appointed in different States, extends only to the limits of the sovereigns creating them. 17 An. 15.

"The successions of persons, domiciled out of the State of Louisiana and leaving property in this State at their demise, shall be opened and administered upon as those of the citizens of the State, and the judge before whom such succession shall be opened, shall proceed to the appointment or confirmation of the officer to administer it

under the name and in the manner pointed out by the existing laws." Revised Statutes of 1870, section 3677.

If all testate successions where, from any cause, the executors named in the wills do not act, are to be administered by the public administrator, and all successions of persons, domiciled out of the State, are to be administered upon, as those of the citizens of the State, and all laws on the same subject matter, conflicting therewith, are repealed, how can the foreign dative testamentary executor be appointed by the court?

Where a dative testamentary executor has to be appointed, the law makes it the duty of the judge to appoint the public administrator, and repeals all laws in conflict therewith on the same subject matter.

The language of the law is not ambiguous; there is no room for construction, and we are not permitted to disregard its letter under pretext of pursuing its spirit. C. C. 13.

It will hardly be contended that the dative testamentary executor of the succession in Ohio is an officer of court, authorized to administer the succession in Louisiana.

We do not see in the record that the judge has made a retrospective application of the act of 1870, as complained of.

The act took effect on the fifth of March, 1870; the petition of the foreign dative executor was filed on the thirtieth of March, 1870. At the time the foreign dative testamentary executor applied to be appointed dative executor of the Louisiana succession, the law of this State made it the duty of the judge to appoint to that office the public administrator. He did so, and we think his appointment valid.

Judgment affirmed.

Rehearing refused.

NO. 3105.—SUCCESSION OF THOMAS SUPPLE.

The appointment of the public administrator to take charge of a succession, pending a contest for the administration, is provisional only, and the public administrator is without authority, nor can the court that has made the appointment, authorize him to sell the property or pay the debts of the estate.

A PPEAL from the Parish Court of Assumption. *Le Blanc*, Parish Judge. *Nicholls & Folse*, for appellants. *Carver & Sims*, for appellee.

HOWELL, J. The widow of the deceased, after having been confirmed as natural tutrix to the minors, applied for letters of administration. This application was opposed by R. N. Sims, who asserted a better right to the appointment; whereupon the public administrator applied for, and obtained, the appointment under the second section of article No. 87, of 1870, which provides: "That, in all contestations for

Succession of Supple.

the administration of estates, the judge of the court in which the succession is open, shall appoint the Public Administrator of the parish to administer the same, until a final decree determines the rights of the respective claimants."

Soon after this he presented a petition for, and obtained, an order to sell all the property of the succession for the purpose, as he alleged, of paying the debts. From these two *ex parte* orders the widow and tutrix appealed.

The appointment of the public administrator seems to be clearly authorized by the above section, as the condition for the same then existed—a contestation for the administration of the estate. The second order was improvidently granted. The fact that the law directs the appointment to be made until a final decree determines the rights of the respective claimants, necessarily implies that it is provisional only, and the public administrator so appointed has only the powers of a provisional administrator, and not those necessary to settle up the succession. If he were authorized to sell the property and pay the debts, the contestation for a *permanent* appointment might be vain and fruitless. "*Lex neminem cogit ad vana seu inutilia.*"

It is therefore ordered that the decree appointing H. L. Swords, the public administrator, to administer this succession pending the contestation for the appointment of a permanent administrator, be affirmed. And it is further ordered that the order of fourteenth November, 1870, decreeing a sale of all the property of this succession for cash, be set aside and annulled; the costs of said order and of this appeal to be paid by H. L. Swords, appellee

No. 2628.—A. D. VOISIN et als. v. T. J. LECHE et als.

Private citizens of a municipal corporation can not enjoin officers from the discharge of their duties, nor can they contest or inquire into their right to the offices by writ of *quo warranto*, even though they be taxpayers.

In a proceeding by *quo warranto* to test the right to an office, no person not disclosing an interest in, or right to, the office, can be heard in the contest. 14 An. 506; Act of 1868, p. 197.

APPEAL from Second Judicial District Court, parish of Jefferson. *Pardee, J. A. N. & H. N. Ogden*, for plaintiffs and appellants. *R. King Cutler* and *G. G. Fisk*, for defendants and appellees.

LUDELING, C. J. Sixty-three private individuals, alleging themselves to be citizens and taxpayers of the city of Jefferson, instituted this suit against the Mayor and Councilmen of the city of Jefferson to have them declared usurpers and to oust them from their offices, and obtained an injunction to restrain the defendants from exercising the functions of said offices.

The exception that the petition contained no cause of action, was sustained by the court *a qua*, and the injunction was dissolved. The plaintiffs have appealed.

We have not been referred to any law which authorizes private citizens, because they pay taxes, to enjoin *de facto* officers of a municipal corporation from exercising the functions of their offices, or to bring an action of *quo warranto*, and we know of none. In the case of the State v. Mason, 14 An., p. 506, this court said: "It appears reasonable that no one but a person, pretending to have a right to an office, should be permitted to contest the right of the incumbent of that office. If each citizen be entitled to do so, then a hundred or a thousand writs of *quo warranto* could be sued out."

The statute of 1868, p. 197, of the session acts, provides the remedy for proceeding against those who usurp, intrude into, or unlawfully hold or exercise public offices.

It is therefore ordered that the judgment of the District Court be affirmed with costs of appeal.

23	26
44	558
23	26
47	374

No. 2511.—ADELE GERNON, wife of James G. Gernon, v. JOSEPHINE DUBOIS, wife of Thos. J. Horrell, et als.

In a suit for interdiction, the defendant, who is charged with insanity or mental unsoundness, must be notified in person. He can not be cited through a *curator ad hoc*. 16 L. 67. The mere application to have a person interdicted does not revoke or in anywise affect a power of attorney given by him.

An agent, holding a full power of attorney to do everything in relation to the property and rights of his principal which occasion may require, may represent his principal in a demand against a succession of which he (the agent) is a co-executor.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Semmes & Mott*, for plaintiff and appellee. *Rosellus & Philips* and *Hays & New*, for defendant and appellant.

LUDELING, C. J. This suit is brought to annul a judgment rendered, in favor of Almira Dubois, executrix of the last will and testament of Oliver Dubois, against William Mish, by the Fifth District Court of New Orleans, on the seventeenth of June, 1865, for \$10,761 68, with eight per cent. per annum interest from the first of June, 1859, until paid. The alleged grounds for annulling the judgment are:

First—That the power of attorney to McClellan (on whom citation was served) did not authorize him to stand in judgment *as a defendant*.

Second—That McClellan, being executor of Dubois, as well as the agent of Mish, occupied a position which debarred him from representing Mish in a matter in which the estate of Dubois was interested, and his conduct was collusive.

Third—That the power of attorney of McClellan was revoked by the insanity of Mish and the proceedings for his interdiction in the

Adele Gernon, wife of James G. Gernon, v. Josephine Dubois, wife of Thos. J. Horrell, et als.

Second District Court, of which McClellan was cognizant, and that he colluded with Mrs. Dubois to conceal from the Fifth District Court (which rendered the judgment) the previous action of the Second and Third District Courts.

For answer, the defendants denied all the allegations in the petition; they alleged that the proceedings in the Second District Court were absolutely null and void, *coram non judice*; and that the plaintiff and her husband have acquiesced in the judgment and recognized its validity.

The substance of the allegations of the plaintiff is, that Mish, the debtor, was not legally cited.

We think the proceedings in the Second District Court, for the interdiction of Mish, were null and void, because he was never cited. His domicile was New Orleans, and he could not be sued there by the appointment of a *curator ad hoc*. The law does not authorize the appointment of a *curator ad hoc* in such a case. Article 391 [384] C. C. directs that "the interdiction may be solicited by any stranger, or pronounced *ex officio* by the judge, after having heard the counsel of the person whose interdiction is prayed for, whom it shall be the duty of the judge to name, if one be not already named by the party." This court held, in *Stafford v. Stafford*, 1 M. N. S. 551, "that the party, sought to be interdicted, must be notified." And, in *Segur v. Pellerin*, this court said. "It is alleged that Pellerin is over twenty-one years of age; and it is sought not only to deprive him of the control of his property and person, but to hold him up to the world, as an idiot or a maniac, without his ever having any notification of it. Such a doctrine would put many eccentric but sensible men completely at the mercy of any one who, through malice or error, might commence proceedings to interdict them." 16 La. 67.

Even if there had been a notification to Mish, there never was judgment of interdiction pronounced; and the mere institution of the suit did not suspend or revoke the power of attorney to McClellan. C. C 3027 [2996]

We can not perceive the force of the objection that McClellan, the agent of Mish, could not be cited to defend a suit instituted by Mrs. Dubois, one of the executors of Oliver Dubois, because he was a co-executor. There is no evidence of collusion; nor is it alleged that any just defense existed against the plaintiff's claim, which he neglected to make.

A careful scrutiny of the power of attorney to McClellan satisfies us, that Mish intended to confer upon his agent ample power to do everything in relation to his property and rights which occasion might require, either for the protection or alienation of his property, to borrow money, grant mortgages, execute notes, make settlements of

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debts due by him by compromise, arbitration or otherwise, and to appear in courts for all purposes and to do and perform whatever he himself could do, if present.

Furthermore, it appears from the record, that the plaintiff has acquiesced in the judgment by paying a part of it. This involved a renunciation of the means and exceptions that might have been opposed to the payment. C. P. 612, 567; C. C. 2252; 2 La. 265, *Fluker v. Lacy*; 4 Rob. 127.

It is therefore ordered and adjudged that the judgment of the District Court be avoided and annulled, and that there be judgment in favor of the defendant, rejecting the plaintiff's demand and dissolving the injunctions, with ten per cent. on the amount of the judgment, as general damages. It is further ordered that the plaintiff pay the costs of both courts.

23	28
119	227

No. 2186.—F. P. MARTINEZ v. THE NEW ORLEANS CITY RAILROAD COMPANY.

In a case where the transcript of appeal is incomplete, on account of the record not containing the evidence offered on trial in the court *a qua*, and the fault is not imputable to the appellant, the cause will be remanded for a new trial *de novo*.

APPEAL from the Sixth District Court, parish of Orleans. *Duplantier, J. Cotton & Lery*, for plaintiff and appellee. *William H. Hunt* and *E. A. Bradford*, for appellants.

LUDELING, C. J. On the application of the defendant, and upon proof that the transcript of appeal did not contain any portion of the testimony of the witnesses who were sworn and examined and who gave their testimony in the case upon the trial thereof, and that the same was reduced to writing, a mandate of this court was issued, addressed to the clerk of the Sixth District Court, directing him to correct the transcript or show cause why he could not do so.

In obedience to this writ, the clerk of the Sixth District Court has certified that the testimony, taken and reduced to writing in the case, can not be found, although strict search has been made, and that the evidence was not in the clerk's office at the time when the transcript of appeal was made.

It is impossible to examine the case, on its merits, without having before us the evidence upon which it was decided.

The fault for this condition of the case does not appear to be attributable to the appellant, and justice demands that the case should be remanded for a new trial.

It is therefore ordered that this case be remanded to the court *a qua*, to be tried *de novo*.

State ex rel. Coons v. Judge of the Thirteenth Judicial District.

No. 2904.—STATE ex rel. COONS v. THE JUDGE OF THE THIRTEENTH JUDICIAL DISTRICT.

The application of a party to remove a cause to the next Circuit Court of the United States, is analogous to a plea to the jurisdiction of the State court, and, when granted, the party against whom it is taken, has the right to appeal. The case would be different, if the application to remove is refused by the court *a qua*. In the latter case no irreparable injury would follow, and the appeal would not be allowed. *Rosenfield v. Adams Express Company*, 21 An. 233.

A mandamus will therefore issue, on application, from the Supreme Court directing the Judge of the District Court to grant an appeal from an order transferring a cause to the Circuit Court of the United States, if the case is in other respects appealable.

APPLICATION for Mandamus. *Thomas P. Farrar*, for relator. *Wade H. Hough*, Judge, respondent. *A. N. & H. N. Ogden*, of counsel for the Judge.

Howe, J. The case of *Martin Cobb & Co. v. Coons* was commenced in February, 1867, in the District court of Madison parish. On the sixteenth day of May, 1870, Thomas J. Martin filed a petition, verified by his affidavit, stating that he is one of the plaintiffs, that he is sole owner of the claims in suit, that he *resides* in the State of Kentucky, and that he has reason to believe, and does believe, that from local influence and prejudice he will not be able to obtain justice in this (the district) court. He prayed that the cause might be removed, to the Circuit Court of the United States, under the provisions of the act of Congress of March 2, 1867. His co-plaintiffs did not join in this request, nor did he state that he or they are *citizens* of any other State than Louisiana. 18 Howard, 137.

The judge granted the order of removal, and on the day following the defendant, Coons, applied for a suspensive appeal, which was refused, and thereupon a mandamus was applied for.

We had occasion to say in the case of *Rosenfield v. the Adams Express Company*, 21 An. 233, that an application to remove is analogous to a plea to the jurisdiction, and that, if granted, an appeal would lie. The remark was, perhaps, not entirely necessary to the decision of that case, but we do not find any reason, on the most careful examination, to doubt its correctness.

In *Beebe v. Armstrong*, 11 Martin, 440, this court entertained such an appeal, and reversed the order of removal. In *Duncan v. Hampton*, 12 Martin, p. 92, a similar appeal was entertained, and the question of the right of appeal seems to have been discussed; for, alluding to a difference of opinion on the merits, Judge Matthews said: "As we are unanimously of opinion that the judgment (of removal) rendered by the District Court is a decision from which an appeal ought to be sustained, it is unnecessary to investigate *that part of the cause*." Judge Martin was in favor, on the merits, of reversing the order of removal. In 4 N. S. there are three cases where similar appeals were entertained: *Louisiana State Bank v. Morgan*, p. 344; *Fitz v. Hayden*, p. 653; and

State ex rel. Coons v. Judge of the Thirteenth Judicial District.

Fisk v. Fisk, p. 676. In the first of these the order of removal was reversed. In Higgins v. McMicken, 6 N. S. 712, the court declared that it had several times entertained jurisdiction of such appeals, and added:

“Such decisions or judgments were properly considered, as final, in consequence of sustaining the petitions for removal. A request to change the jurisdiction of a suit from a State court to one of the United States, under the law of Congress, is analogous to a plea to the jurisdiction of the court in which the proceedings commenced; and, when a removal is ordered, the plaintiff would be without remedy against such order, unless by appeal.”

In Stoker v. Leavenworth, 7 La. p. 390, a similar appeal was entertained, and the “judgment” of removal affirmed; and the same action was had in Franciscus v. Surget, 6 Rob. 33.

We cannot undertake to disturb this well settled jurisprudence.

It is therefore ordered that the mandamus issued herein be made peremptory.

No. 2903.—STATE ex rel. TOWNE v. THE JUDGE OF THE THIRTEENTH JUDICIAL DISTRICT.

On Application for Mandamus

HOWE, J. The reasons, given in the case of State ex rel. Coons v. same respondent, apply equally to this.

It is therefore ordered that the mandamus issued be made peremptory

No. 2011.—JOHN ROONEY v. MISS MARY A. MAY.

The certificate of the surveyor of a municipal corporation, that public work, in making wooden curbs and gutter with planks, under a contract with the corporation, is done in accordance with the specifications, may be rebutted and overthrown by the testimony of witnesses to the contrary.

APPEAL from the Seventh District Court for the parish of Orleans. Collens, J. George L. Bright, for plaintiff and appellant. C. Rodney May and A. N. & H. N. Ogden, for defendant and appellee.

LUDELING, C. J. This is an action to recover the price of work done on the front of defendant's property, under a contract with the City of Jefferson, for making wooden curbs and gutter with planks, on Peters avenue, between Magazine street and St. Charles avenue.

The defense substantially is, that the work was not done in accordance with the specifications of the contract.

There was judgment in the lower court in favor of the defendant, and the plaintiff has appealed.

Rooney v. Miss Mary A. May.

We think the evidence establishes this defense. The presumption in favor of the correctness of the surveyor's certificate is fully rebutted by the testimony of several credible witnesses, who saw the materials before they were used in the work, and who have carefully examined the work since its completion. John Omond swears: "My occupation is a carpenter for the last thirty-eight years. I examined the lumber used in the curbing in front of Miss May's property, to-day. Some of the lumber is good, *and some is bad and pecky and rotten.* The lumber could never have been fit for this purpose, and never could have been first class lumber. I know the difference in lumber. It is the soft cypress, which is not fit for any such purpose. It is a low priced cypress. *In a private contract,* I would not like to try such lumber in filling out the contract. It is not salable *as third quality lumber.*" Being asked, if the lumber would not last a reasonable time, he answered: "No, sir; half of it is rotten now. The curbing is done in a pretty good style for rough work, but the gutter bottom is not fast; the first flood would take it away."

Thomas S. Elder says: "Considerable portion of it (the lumber) was pecky and rotten, and had knot holes in it." * * * "I can buy such lumber for half the price of first quality lumber. The work is done very rough; have never seen any such work done elsewhere."

The same facts were substantially proved by other carpenters and by an architect, W. Thiel, all of whom, from their calling and experience, we may infer, were competent experts.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs of appeal.

No. 3049.—STATE ex rel. BEEBE v. THE JUDGE OF THE SECOND DISTRICT COURT, PARISH OF ORLEANS.

23	31
46	498
23	31
52	108

After a suspensive appeal has been granted and the bond has been given and filed, the jurisdiction of the judge *a quo* over the case is limited to testing the solvency and sufficiency of the surety on the bond. 21 An. 152

The judge *a quo* is, therefore, not competent, after he has granted a suspensive appeal and fixed the amount of the bond, to make an order declaring the appeal devolutive only on the ground that the bond is insufficient in amount for a suspensive appeal. But the remedy of the appellant in such a case is by a writ of prohibition, and not by mandamus. 21 An. 113.

APPPLICATION for a Writ of Mandamus. *Fellows & Mills*, for relators. *Louis Duvigneaud*, Judge, respondent.

Howe, J. Luc Beebe obtained a judgment against the succession of Charles Beebe, recognizing him as sole heir of Manette Dubreuil and decreeing the whole of the property contained in the inventory of the succession to be assets of the partnership, existing theretofore between Manette Dubreuil and the late Charles Beebe and Luc Beebe, as her sole heir, entitled to her share thereof, and directing the parties

State ex rel. Beebe v. Judge of the Second District Court, Parish of Orleans.

to proceed to a partition. William Beebe, the administrator, applied for, and obtained, a suspensive appeal upon condition of giving a bond for three hundred dollars, which was accordingly given. Some days after, Luc Beebe took a rule to dismiss the appeal on the ground that the bond was insufficient (in amount) to suspend the judgment. This rule was made absolute "so far as to declare the appeal a devolutive and not a suspensive appeal."

Thereupon, the administrator, William Beebe, relator herein, applied to this court for a mandamus to compel the judge to grant a suspensive appeal from the original judgment and to restrain him from further action, etc. A rule *nisi* was issued.

It seems clear that the judgment above recited is not one, the appeal from which is regulated by articles 575, 576 or 577 of the Code of Practice. It is not for a specific sum, nor for the delivery of a movable, nor does it decree the *delivery* of real estate. See State ex rel. Hickey v. Judge Fourth District Court, 29 An. 108. Following this decision, we must think that the bond given was sufficient to cover costs and so to suspend proceedings. If, therefore, the respondent had a right to take any step in the case, beyond testing the sufficiency of the surety, 21 An. 152, 113, he erred in declaring the appeal to be merely devolutive.

But the relator has mistaken his remedy, which should have been the obtaining of a prohibition. He does not need another suspensive appeal. State ex rel. Johnson v. Judge Fifth District Court, 21 An. 114.

It is therefore ordered that the application for the mandamus be dismissed at relator's cost, reserving to him the right to proceed, if necessary, by prohibition.

No. 2165.—LAFITTE, DUFILHO & Co. v. PAUL N. RIVERA.

An obligation to pay a certain amount in gold dollars can not be discharged by paying a like sum in United States treasury notes, although such notes be a legal tender. The Supreme Court of the United States having decided that such contracts can only be legally discharged by their payment in gold, the courts of Louisiana will follow their decisions and give judgment in gold. 7 Wal. 229, 529; 8 Wal. 609.

The judgment must, however, be given for gold and not for its supposed equivalent, predicated on the market value of gold, when compared with treasury notes at the date of the contract.

APPEAL from the Fourth District Court, parish of Orleans.
Theard, J. A. L. Tissot, for plaintiffs and appellants. *Lambert & Murphy*, for defendant and appellee.

LUDELING, C. J. On the twelfth of January, 1869, Lafitte, Dufilho & Co., the transferees and holders, instituted suit against the acceptor on the following bill of exchange:

Lafitte, Dufilho & Co. v. Rivera.

"Paris, le 14 Octobre 1867.—Bon pour dollars en pièces d'or, \$962 59. Au premier Janvier 1869 payez par cette seule de change, à l'ordre de nous-mêmes, la somme de neuf cent soixante-deux dollars cinquante-neuf cents, en pièces d'or, valeur reçue en marchandises. que passerez suivant l'avis de Monsieur P. N. Rivera.

Par procuration, MAYAND FRERES,
A. CONSTANTIN."

The plaintiff also obtained an attachment against the property of the defendant.

The attachment was dissolved and judgment was rendered against the defendant for \$1266 56, in United States treasury notes, the equivalent of \$962 59 in gold at the rate of exchange of the day. The plaintiff has appealed from the judgment dissolving the attachment, and the defendant has appealed from the judgment against him.

The evidence in the record fully sustains the order dissolving the attachment.

We must regard the question presented on the merits, whether an obligation to pay a sum in gold dollars can be satisfied by paying a like sum in treasury notes, as settled by the decisions of the Supreme Court of the United States in the cases of *Bronson v. Rodes*, 7 Wallace, 229, and *Butler v. Horwitz*, 259; *Hepburn & Griswold*, 8 Wallace, 609. The judgment should have been for the sum specified, with interest, in gold.

It is therefore ordered that the judgment of the district court be set aside; that there be judgment in favor of plaintiffs against the defendant for nine hundred and sixty-two dollars and fifty-nine cents, with five per cent. per annum interest thereon from the sixth January, 1869, till paid, in gold, and the costs incurred in the lower court, except those occasioned by the attachment. It is further ordered that the plaintiffs pay the costs of appeal.

No. 3097.—Mrs. E. G. MILLER, Executrix, v. FRANKLIN CURTIS et al.

23	33
121	730

In this case a broker had entrusted to him the sale of a plantation in the parish of St. James. The purchaser, Curtis, was informed by the broker of the terms of the sale, which included the brokerage of two per cent. on the price to be paid by the purchaser. Curtis joined another party with him in the purchase, who knew nothing of the agreement to pay brokerage. Held—That this fact did not lessen his liability to the broker.

APPEAL from the Fourth Judicial District Court, parish of St. James. *Beauvais, J. Alfred Roman*, for plaintiff and appellee. *Legendre & Poche*, for defendants and appellants.

LUDELING, C. J. This is a suit by the executrix of G. W. Miller, a real estate broker, for his commission for negotiating the sale of "Longview Plantation," in the parish of St. James.

Mrs. E. G. Miller, Executrix, v. Curtis et al.

The petitioner alleges that the said G. W. Miller was entrusted with the sale of the plantation by the owner under the stipulation that the purchaser should pay the brokerage of two per cent. on the price to be obtained; that Curtis, having been informed of the price and conditions of the sale, agreed to them, and subsequently he bought the plantation with another person.

The defendant admits that he and one Ball bought the place; that he had negotiated for it with Miller, but he denies that he agreed to pay the brokerage.

The evidence establishes the claim of the plaintiff. The fact that Mr. Curtis joined another with him in the purchase of the plantation, does not lessen his liability to the broker.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

No. 3093.—PIERRE DAIGLE v. ALEXANDER LIRETTE.

The District Courts have original jurisdiction in all cases (not probate) where the amount involved is above five hundred dollars, exclusive of interest, without reference to the defense which may be urged against the claim. Constitution, article eighty-five.

Therefore the District Court has jurisdiction *ratione materiae* in a damage suit where one thousand dollars are claimed, although the verdict of the jury only awards one hundred dollars.

APPEAL from the Third District Court, Parish of Terrebonne. *Train, J. J. Aycock*, for plaintiff and appellee. *Bush & Good*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment against him for damages founded on the verdict of the jury.

The petitioner prays for one thousand dollars damages for trespass, committed by the defendant in cutting wood off his land. The verdict of the jury and the judgment, however, are for only one hundred dollars.

The damage being less than the amount claimed, the defendant insists that the district court was without jurisdiction *ratione materiae*. The amount in dispute is the amount for which the plaintiff prayed judgment, whether there was a good defense to it or not. The court may have jurisdiction even though the petitioner fails entirely to prove his demand. Article eighty-five, of the Constitution of 1868, is very plain. It says: "The district court shall have original jurisdiction in all civil cases when the amount in dispute exceeds five hundred dollars, exclusive of interest." * * * * *

The case was properly a jury case, and we find their verdict supported by the evidence. It should therefore remain undisturbed.

Judgment affirmed.

No. 2026.—BOSTICK & SEYMOUR v. J. R. SHANNON.

A, the judgment creditor of B, caused a lot of tobacco in a warehouse to be seized as the property of his debtor. C, a third party, intervened and claimed the property. The facts elicited on trial show that B was the agent of C; that he had offered to sell the tobacco, and pointed it out to two brokers for that purpose; that A, being present when it was offered for sale as B's property, caused it to be seized.

C, the intervenor, showed a bill of sale of the tobacco, the warehouseman's receipt, and the authentic act constituting B her agent.

Held—That the evidence of the brokers that B engaged them to sell the tobacco, which was pointed out to them in the warehouse as B's property, was insufficient to overthrow the title of C, as established by the bill of sale and the warehouseman's receipt; that the agent was under no obligation to disclose his capacity to the brokers, when he applied to them to have the property sold.

A PPEAL from the Fourth District Court, parish of Orleans.
Theard, J. M. M. Cohen, for plaintiffs and appellees. *R. & H. Harr*, for opponent and appellant.

HOWELL, J. On the fourth June, 1866, plaintiffs obtained judgment against the defendants for \$535 10, with legal interest from ninth June, 1862, and on the twenty-first June, 1866, seized a lot of tobacco, in the warehouse of one D. Morgan, as the property of defendants. Thereupon Mrs. M. G. Knorr enjoined the sale on the ground that the property belonged to her. On the trial she introduced the receipt of the warehouseman in her name, for the same tobacco, dated June 3, 1866, the correctness of which is attested by Morgan, who says the body of the receipt is in the handwriting of Shannon. She also introduced a bill for the purchase of said tobacco, made out in her name, dated April 3, 1866, and receipted by the vendor. It seems that this bill had been dated at Madison, and the words, New Orleans, written over it. Shannon acted for her in the handling of this tobacco and delivering it to Morgan "for storage and sale," under a full and formal power of attorney, passed before a notary public, on twenty-first October, 1865.

To rebut this evidence the plaintiffs offered the testimony of a broker to the effect, that he was authorized by another broker, in the presence of Shannon, to sell this tobacco; that he offered it for sale as Shannon's property, went with the party to the warehouse and asked for Shannon's tobacco, and was shown this lot; the testimony of one of the plaintiffs, that, having heard it offered by the broker as Shannon's property, he went with a deputy sheriff to the warehouse, asked for Shannon's tobacco, was shown this lot, and caused it to be seized, and he believed the receipts in evidence, from their appearance, were ante-dated; and the testimony of another witness who also believed said receipts were ante-dated.

While these circumstances may have led plaintiffs to believe that Shannon was the owner of the property, yet they are not sufficient to outweigh the evidence in support of intervenor's title, as shown by

Bostick & Seymour v. Shannon.

the warehouseman's receipt, her bill of purchase and the agency of Shannon.

An agent or factor may not always disclose the name of his principal, when endeavoring to sell property for the latter. And it is observable, that Shannon is not shown to have claimed or even admitted, that this tobacco belonged to him. The broker who testified does not expressly say that he spoke of it as Shannon's property in his presence, but only that he and another broker spoke of selling a lot of tobacco, then in Morgan's warehouse and there shown to him as Shannon's. None of the witnesses appear to have been examined in presence of the judge *a quo*, who gave judgment in favor of plaintiffs. The evidence brings us to a different conclusion.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of Mrs. M. G. Knorr, declaring her to be the owner of the tobacco seized herein, and that the same be restored to her, with costs in both courts.

No. 1992.—C. CASE, Receiver, etc., v. J. W. CANNON and D. C. McCAN.

Obligations, acquired subsequently to the insolvency, can not be pleaded in compensation by the debtor of the insolvent.

Where judgment has been given in the court below for more than is demanded in the petition, it will be reduced on appeal to the amount demanded, and the plaintiff will be condemned to pay the costs of the appeal.

APPEAL from Fifth District Court, parish of Orleans. *Leaumont, J.* George L. Bright and J. D. Rouse, for plaintiff and appellee. *H. D. Stone*, for defendant and appellant

HOWELL, J. This is a suit against the maker and indorser of a promissory note for \$5000, the defense to which is the plea of compensation, based on three drafts, amounting, as set out in the first answer, to \$5077 42, and in the second to \$2831 84, drawn by the First National Bank of New Orleans on the Fourth National Bank of New York

On the second trial, in the court below, judgment was rendered against Cannon alone for \$7000, from which he has appealed. It is suggested that this is the judgment which was rendered in the suit of Case, Receiver, etc., v. J. W. Cannon, No. 18,157, on docket of the lower court, and improperly copied into the record of this suit, having the number 18,574, of said docket, and in the answer to the appeal we are asked to render judgment, as prayed for below, against both defendants *in solido*. The objection to this is, that if such error exists, one of the defendants, McCAN, is not before us, except as appellee, and we can not amend a judgment as between appellees. Plaintiff should have appealed so as to have the parties properly before us. The plea

of compensation is not sustained. It is shown by defendant Cannon's vendor, that Cannon acquired these drafts after the bank failed; and there is in the record an admission, "that the First National Bank stopped payment on the thirteenth May, 1867." Defendant alleges that he acquired the drafts on the fourteenth May, 1867. After this failure the debtors and creditors of the bank could do no act to change their relations to the bank so as to affect in any manner the *pro rata* distribution, to be made between the creditors. See 13 U. S. Statutes at large, p. 114, § 50. It is well settled that compensation can not be pleaded in cases of insolvency, when the debtor of the insolvent acquires the claim proposed to be compensated subsequently to the failure of the insolvent. 2 L. 82; 14 L. 556; 2 An. 459; 6 N. S. 66; 3 N. S. 29; 1 N. S. 481.

The admission of defendant in the record sufficiently fixes the condition of the bank in this instance to apply this principle. The judgment, however, should be reduced to the amount claimed.

It is therefore ordered that the judgment appealed from be reduced from \$7000 to \$5000, with five per cent. interest from June 5, 1867, and \$3 30 costs of protest and costs in the lower court, and that, as thus amended, the said judgment be affirmed, costs of appeal to be paid by plaintiff and appellee.

HOWE, J., recused.

No. 2225.—A. B. JAMES v. FELLOWES & Co.—J. HERNANDEZ, Appellant.

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A motion to dismiss an appeal which is founded on the want of a legal right to the appeal, may be made at any time. It is only such motions as go to the irregularity of bringing up the appeal, that must be made within three judicial days from the filing of the transcript in the appellate court.

After the appeal has been granted and the bond has been filed, the court *a qua* is without jurisdiction to examine whether the appellant has acquiesced in the judgment, and, therefore, not entitled to the appeal. In such a case, the appellate court being vested with jurisdiction of the appeal, and the court *a qua* being divested of jurisdiction over the case, the motion to dismiss, on the ground of acquiescence in the judgment, must be made in the appellate court, and if the fact of acquiescence do not appear in the record, the case will be remanded, with instructions to the judge *a quo* to take evidence on and try the question of acquiescence in the judgment appealed from.

A PPEAL from the Sixth District Court for the parish of Orleans.
 Cooley, J. P. H. Morgan, for plaintiff and appellee. Cooley & Phillips, for J. Hernandez, defendant and appellant.

HOWELL, J. A motion is made to dismiss the appeal on the ground that the appellant has acquiesced in, and voluntarily executed, the judgment before appealing therefrom.

It is objected, *first*, that the motion was not made until long after the three days after the return day; *secondly*, there is no evidence before the court to prove any acquiescence, or ratification, or execution of the judgment appealed from; the evidence offered in the court

below, on a similar motion made in that court, was rejected and forms no part of the evidence in the case; *thirdly*, there was no legal judgment to satisfy or execute, the case having been tried and decided and the judgment signed in vacation; and, *fourthly*, the rule taken in the lower court to dismiss the appeal, on the same grounds as now urged, was dismissed, and that judgment is *res judicata*.

I. We think the motion is in time, as it is not based on any informality or irregularity in taking and bringing up the appeal, but on the want of the legal right to appeal. Article 567, C. P., declares that "the party against whom judgment has been rendered can not appeal, if such judgment have been confessed by him, or if he have acquiesced in the same by executing it voluntarily." Here the right of appeal is positively denied, in case the judgment is voluntarily executed, and this fact may be brought to the notice of the court at any time. It may occur, and has occurred, that, pending the appeal, the appellant executes the judgment against him, see 10 An. 643, in which event it would be impossible to make the motion within the three days after the return day, and yet the appellee would have the right, in the proper mode, to show the fact and obtain the dismissal of the appeal. A party should not, and by law can not, be heard to complain of a judgment, the correctness of which he admits by satisfying it.

II. and IV. These objections seem to be somewhat inconsistent. If the judge *a quo* refused to hear evidence on the fact of payment, his judgment, dismissing the motion based on that alleged fact, can scarcely be *res judicata* as to such fact. Although we can not revise proceedings had after an appeal has been granted and perfected, we must presume from the objections which we are considering, that the judge refused the rule on the ground that he was without jurisdiction, which is true according to our jurisprudence, and hence the evidence could not be heard, and the judgment, dismissing the rule or motion, does not debar the plaintiff from urging his motion in this court, which alone can dismiss an appeal once vested here. Upon the application made to the judge *a quo*, and with the facts before him, he did not err in granting an appeal to which the appellant was *prima facie* entitled; and, having granted it, this court, being vested with jurisdiction, could alone entertain the motion; but there is no such evidence before us as to enable us to act. Having, however, no original jurisdiction, we must remand the case to try the issue raised by the motion.

III. The third objection pertains to the merits, and can be examined only when the appeal is properly before us.

It is therefore ordered that this case be remanded to the lower court with instructions to the district judge to hear evidence on and try the question of acquiescence in the judgment, appealed from, by full or partial payment.

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No. 1726.—SOUTHERN DRY DOCK COMPANY v. THE STEAMBOAT J. D. PERRY, CAPTAIN A. BAIRD AND OWNERS.

The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. Constitution of the United States, section second, article third.

The District Courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. Act of Congress, September 24, 1789.

A proceeding by provisional seizure, authorized by State law, when taken out against a vessel of a foreign port, while lying in a port of this State, to enforce a claim for repairs made and materials furnished at the foreign port, is a proceeding *in rem* or in admiralty, and the State courts are without jurisdiction. *Per curiam*: A distinction must be taken between a lien on a vessel at the home port for materials furnished and labor done in repairing her, and the lien for the same, when the vessel is found in a foreign port. In the former case no admiralty lien exists in favor of the builder or furnisher of materials, and the local jurisdiction attaches. But in the latter case an admiralty lien exists, and the State courts are without jurisdiction to enforce it. The form of the writ or proceeding, provided by the local law, is immaterial, if the object sought is to enforce an admiralty lien.

In a case like this, however, where the master has been cited personally, and is sought to be made liable in his individual capacity, the State courts, while they are without jurisdiction to proceed *in rem* by provisional seizure, have jurisdiction of the personal action.

A PPEAL from Fifth District Court, parish of Orleans. *Leaumont, J. Bentnick Egan*, for plaintiff and appellant. *Given Campbell*, for defendants and appellees.

HOWE, J. The petition of the plaintiff alleged "that Capt. A. Baird and the owners of the steamboat J. D. Perry, a boat engaged in carrying freight and passengers for hire," were indebted to petitioner *in solido*, in the sum of \$1029 30, for work and materials furnished in making repairs to the said steamboat; and after claiming a *privilege on the vessel*, they prayed that a writ of provisional seizure might issue against her, and that Capt. Baird and the owners might be cited and condemned to pay the plaintiff the sum claimed, with interest, "and with *privilege on the steamboat J. D. Perry*."

The writ was issued and the vessel seized. Baird was cited, as captain, to answer the petition, and an answer was filed in the form of a general denial by "the defendants." A supplemental petition was afterwards filed by the plaintiff, averring that Baird was sole owner. No *contestatio litis* was formed on this, but as evidence was offered and received, without objection, to prove the ownership by Baird, we will consider the case, as if the vessel was the property of Baird, the personal defendant.

A peremptory exception was filed on behalf of the defendants, generally, to the jurisdiction of the court, on the ground that the proceeding was one *in rem* to enforce an admiralty claim against the vessel for repairs and materials. A rule was also taken to set aside the writ of personal seizure for the same reason, and the exception and rule and the merits were tried together. The court maintained the exceptions and dismissed the suit, and the plaintiff appealed.

From the manner in which the case has been conducted, it becomes necessary to consider it in two aspects: First, as to the validity of the writ of provisional seizure, (and this must depend on the original petition and affidavit); and second, as to the right to a personal judgment against Baird.

1. The question of validity of the writ of personal seizure, considered from the point of view of the original petition and affidavit, is one which has been fruitful of discussion in the State and national tribunals. By section second of article third of the Constitution of the United States, it is provided that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction; and, in execution of this broad provision, it is declared by the act of Congress of September 24, 1789, that the District Courts of the United States "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The wisdom of these provisions is apparent, yet no one, familiar with the subject, can have failed to observe a constant tendency to evade or infringe them, and in every commercial city of our seacoast the ships and vessels of other States and nations have been repeatedly subjected to annoyance in violation of these salutary rules.

The Supreme Court of the United States, whose rulings on this subject are necessarily of highest authority, has had occasion recently to condemn this increasing abuse and to formulate the true doctrine in the premises. In the case of the *Moses Taylor*, 4 Wallace 411, that court said:

"The distinguishing and characteristic feature of such suit," (*in rem* in the admiralty,) "is, that the vessel or thing proceeded against is itself seized and impleaded, as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself, which gives to the title, made under its decrees, validity against all the world. By the common law process, whether of *mesne* attachment or execution, property is reached *only* through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold. The statute of California to the extent in which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction."

And to this extent the statute was declared to be void.

In the case of the *Hine*, 4 Wallace 555, the same tribunal, in declaring the nullity of a statute of the State of Iowa, by which suits

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substantially *in rem* against vessels for causes, cognizable in the admiralty, were authorized, and alluding to the clause of the act of 1789, which saves to suitors "the right of a common law remedy where the common law is competent to give it," said :

"It could not have been the intention of Congress, by the exception in that section, to give the suitor all such *remedies* as might afterwards be enacted by State statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases by simply providing a statutory remedy for all cases. 'Thus the exclusive jurisdiction of the federal courts would be defeated.'"

In the case of the *Belfast*, 7 Wallace 624, the same court held language which is especially applicable to the case at bar. Alluding again to the "common law remedy," which is saved to the suitor and which is now urged before us as a justification for the issuance of the writ of provisional seizure in the present suit, it said :

"Proceedings, in a suit at common law, on a contract of affreightment, are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and in the States, where there are attachment laws, the plaintiff may attach any property not exempted from execution belonging to the defendant. * * *

Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment, *except the interest of the owner* in the vessel, because the vessel is held, under the attachment, as the property of the defendant and not as the offending *thing*, as in the case of a proceeding *in rem* to enforce a maritime lien."

It is apparent, then, that our State courts can have no power to enforce, by proceedings *in rem*, an admiralty lien against a vessel. They may seize and hold for final judgment the interest of a personal defendant *in a vessel*, in proper cases, by any writ addressed to such interest alone. The name of the writ is unimportant. It is commonly called attachment; such is its name in this State; but by any other name it would have as great validity, and the principal question in the case at bar, which we find it necessary to decide, is, whether the writ of provisional seizure could lawfully issue. We are of opinion that it could not.

The privilege thus sought to be enforced is an admiralty lien—the lien of a material man—for work and materials furnished in New Orleans to a foreign vessel, which came hither from the Ohio river and was bound to White river, in Arkansas. The cases cited by plaintiff against this position are not in point, for there is a wide difference in legal necessity between work done in building a vessel on shore, at

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the place of her nativity, and work and materials furnished by way of repairs in a foreign port. The former has not, the latter have, an admiralty lien. The privilege springs from the nature of the debt, and the writ of provisional seizure by which it is sought to be enforced, grasps the thing itself, and not merely the interest of some person or persons in the thing. If enforced by judgment, "with privilege," as prayed for in the original petition in this case, there would be sold, not the interest of Baird, for it is not alleged that he has any, or of any other person, but the vessel herself, her tackle, apparel and furniture, free and clear of all titles, interests, mortgages, privileges and other incumbrances, the claims of the whole world being transferred to the fund realized. We can see no practical difference in origin, progress and result between the operations of such a writ and those of admiralty process. It goes as far and strikes as deeply.

It is urged that the writ of provisional seizure in this case is a "conservatory act" merely, and not liable to the objection of infringing the admiralty jurisdiction. It is true that the writ is conservatory, but so also is the admiralty process which issues upon the filing of a libel, being provisional merely and falling to the ground if the libellant does not establish a case, or if the claimant establishes a defense. The objects of the two writs are identical; both are issued upon the allegation of a privilege, upon a mere affidavit and without bond in favor of the owner of the thing seized. So far as the writ of provisional seizure and the prayer for the enforcement of the privilege, in this case, are concerned, the action is *in rem, against the object seized*, its true ownership being of no moment. That object being a vessel and the privilege a maritime lien, we have, infolded in the suit, a proceeding which is in reality an admiralty proceeding, and the fact that the plaintiff asked, also, for a personal judgment against Baird, can not divert our attention from the fact that he has asked for a judgment *in rem* against the vessel described as the property of *some one else*.

The original petition of the plaintiff, with a few changes of terminology, would be a libel in admiralty, and its prayer does not differ substantially from that of a libel in which the actions *in rem* against the vessel and *in personam* against the master are joined. To sustain the writ of provisional seizure and a consequent judgment against the vessel for the privilege alleged, would be, by indirection at least, to infringe the exclusive jurisdiction of the courts of the United States.

2. But, as the pleadings stand, a personal action also is instituted against Baird, and we think the judge *a quo* went too far in dismissing the entire suit. The writ of provisional seizure was properly set aside, for the petition and affidavit on which it was asked for, did not authorize its issuance. But there is evidence enough to justify a personal judgment against Baird who was duly cited.

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It is therefore ordered and adjudged that the judgment appealed from be reversed. It is further ordered that the writ of provisional seizure issued herein be quashed, with costs thereof; that the plaintiff have judgment against the defendant, A. Baird, for the sum of one thousand and twenty-nine dollars and thirty cents, with legal interest from January 2, 1867, and other costs of the lower court; and that the appellees pay the costs of appeal.

No. 3000.—Mrs. ANN SMITH, Widow, etc., Administratrix, et al. v. JAMES H. JONES et al.

The room or place where the court usually holds its sessions is not sacramental. Therefore, court may be opened and held in the room, commonly used as a clerk's office, and the decrees and judgments, rendered in such room or place, will not be void on that account.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. A. L. Tissot and Cotton & Levy*, for plaintiffs and appellants. *Hornor & Benedict*, for defendants and appellees

Howe, J. James H. Jones instituted executory proceedings in the Fifth District Court, for the parish of Orleans, for the collection of a note made by A. W. Horlor and secured by mortgage and vendor's privilege.

The plaintiff in this case, widow and administratrix of Horlor, and Emelia Horlor, daughter of the deceased, sued out the injunction, now before us, to arrest the seizure and sale on various grounds, which do not seem to be either established by the evidence or insisted upon in the argument.

A rule was taken by Jones, defendant in injunction, to dissolve the same, on the grounds that the petition was untrue; that it set up no cause of action; that no special relief except an indefinite delay was asked, and that the bond was too small.

The case was tried summarily, and judgment given by the court *a qua*, dissolving the injunction, with ten per cent. damages, and the plaintiffs appealed.

The injunction appears to have been sued out merely for delay, and the points made here are purely technical.

The trial of the rule occupied five days in the court below. It seems that when the cause came up, at 10 A. M. of the second day, the witnesses of the plaintiffs were not present, and attachments were issued returnable at noon. The judge proceeded with the trial of another cause, a jury case. At noon, witnesses having arrived, the judge left the jury case and proceeded with the summary trial of the rule in the adjoining room, used as a clerk's office; but yet in open court, in the legal sense, there being a judge, a clerk and a sheriff, and the record showing that the court was open. The parties to the jury cause, who

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were thus left, are not before us, and do not complain; and we can not perceive that the plaintiffs have any legal reason to consider themselves aggrieved. It will hardly be pretended that, of the two rooms in question, one is much better than the other, and certainly not, that it is sacramental to use one for holding "open court" rather than the other. And, finally, it is not pretended that on the first, third, fourth and fifth days of the trial, there were any irregularities in the method of holding the court.

It is suggested parenthetically in the brief that the court *a qua* was without jurisdiction. The point is untenable. See *Graham v. Markey*, 22 An.

Judgment affirmed.

No. 1912.—*AUSTIN, THORPE & Co. and others v. DA ROCHA, BECKER & Co.*—*Mrs. PELANNE and others, opponents.*

A seizing creditor can not disregard a sale of an interest in a store, on the ground that it is made in fraud of the rights of creditors.

Before he can maintain a seizure in such a case, the sale must be declared null by direct action. The rule is different in case of a simulation. In the latter case seizure may be made and the property sold without reference to the sale.

A *bona fide* purchaser of an interest in a store, whereby she becomes a partner *in commendam*, does not lose her rights by declining to enjoin the sale of the store which is under seizure. The rights of a partner *in commendam* may be enforced as well by third opposition against the proceeds of the sale. But in the latter case the amount which the property brought at sheriff's sale, will be taken as the basis on which the proceeds are to be distributed, unless it be shown that there was fraud or other ill practices in the sale which led to the sacrifice of the property.

The privileges existing on the stock of goods for the salaries of clerks, which have been ascertained and recognized by third opposition, will be first paid out of the proceeds of the sale of the property by the sheriff, unless as in this case the partner *in commendam* expressly assumed to pay them.

These privileges of clerks for salaries on the goods in the store are not lost or impaired by a simulated sale and transfer of the store to other parties; nor does the taking of a note by a clerk for his salary novate the debt nor destroy the privilege.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Collens & Wooldridge and J. Ad. Roxier*, for plaintiffs and appellants. *C. Dufour and J. Q. A. Fellows*, for appellees.

WYLY, J. The plaintiffs who are appellants, obtained respectively judgments against the defendants in December, 1866. Under executions issued thereon, the contents of the stores Nos. 136 Chartres street and 147 Canal street, were seized on the twelfth of June, 1867, as the property of the defendants. The legality of the seizure of the Canal street store and the proceeds of the sales of both the stores, form the subject of the present controversy.

A few days before the sale Mrs. Raymond Pelanne claimed an interest in the contents of the store 147 Canal street, to the extent of \$12,000, as partner *in commendam* of one J. D. Meredith, whose name at the

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time of seizure was on a sign over the door. She did not enjoin the sale, however, but on the sixth of July filed a petition of third opposition, reciting her interest and praying as follows: "That an order be issued to the effect that, if the said sheriff should persist in selling, the proceeds of said sale may be retained and kept in his hands until the determination of this third opposition and petition for damages; that the sheriff, H. T. Hays, of New Orleans, and the seizing creditors aforesaid, Austin, Thorpe & Co., Butler & Pitkin and Wright, Brinkerhoff & Co., be severally cited; that said Harry T. Hays, sheriff, together with said seizing creditors (if they can be found), be condemned *in solido* to pay your petitioner the sum of twelve thousand dollars, being the value of her property wrongfully seized and taken away as aforesaid, and the further sum of — dollars per month for rent as stated above from the first of June last, until the determination of this suit; and the further sum of one thousand dollars as special damages for counsel fees, in prosecution of the present claim and all costs, with privilege on the proceeds of said sale, for general relief," etc.

The court *a qua* ordered the sheriff to retain in his hands all the proceeds of sale, including those of the sale of the contents of the store 136 Chartres street, to which Mrs. Pelanne made no claim.

Several oppositions were filed by parties whose claims were rejected by the court *a qua*, and who have not appealed.

The following parties made oppositions, claiming privilege as clerks under article 3158 of the Civil Code, viz:

Charles Baudier, for \$56 52; H. Meridier, for \$97 91; J. S. Shaw, for \$193 52; James T. Howard, for \$691 10; Daniel Van Allen, for \$900.

The claims of the first three were allowed. The claims of Howard and Van Allen were rejected on the ground that they had lost their privilege by novation of their debts, and they have appealed.

The plaintiffs answered Mrs. Pelanne's opposition by a general denial, and specially denied the title set up by her, and averred that if she had any title it was void and of no effect against them; that it was simulated and fraudulent, and the result of a conspiracy to cover and conceal the property of the defendants, Da Rocha, Becker & Co., from their creditors, and especially from the plaintiffs.

The judge *a quo* was of the opinion that as to the claim of Mrs. Pelanne the only question was simulation or not; that the transaction by which she claimed an interest in the store 147 Canal street, to the extent of \$12,000, was a real one; that she was in possession of the interest thus claimed through Meredith; that the seizure of the goods by the plaintiffs, and their sale, involved the loss of her interest and that she must be indemnified for her loss by the allowance to her of all

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the proceeds of sale of this store, except the amount of certain privileged claims.

The proceeds of the store on Chartres street were consumed in costs.

The plaintiffs appealed and were joined as stated above, by two of the clerks.

As to the third opposition of Mrs. Pelanne, we agree with the District Judge, that the only question is simulation or not. If her part ownership of the contents of the store, 147 Canal street, was real, though acquired in fraud of the rights of the plaintiffs, their seizure of that store was illegal; her rights could not be assailed in that manner, and her opposition must be maintained.

Whether she saw fit to enjoin the sale or not, can not prejudice her rights in the premises. C. P. 400.

It is only simulated sales that the seizing creditor is permitted to disregard, because they pass no title and are not subject to the rules of real contracts operating injuriously to creditors.

If this opponent has an actual title, accompanied with possession, the plaintiffs who have thus assailed it, will not be heard setting up fraud in the transfer; that ground of nullity they must seek in a direct action.

An examination of the evidence satisfies us that the claim of the opponent, Mrs. Pelanne, was not fictitious; as to her the transaction was not a simulation; that for a valuable consideration she became a partner in *commendam*, acquiring a part ownership of the store as claimed, and had possession thereof through the partnership of which she was a member, the possession of a partnership being for each of the partners.

There is no doubt, however, that as to the defendants there was a bold simulation and fraud attempted; that Samuels and Meredith were merely interposed with fictitious titles to cover the turpitude of the defendants; that these parties merely held for the defendants, who never parted with actual title until they caused the transfer to be made to the third opponent, Mrs. Pelanne.

We regard the partnership with Meredith and the transfer from Samuels as but the consummation of one transaction which was conducted by the defendants, doubtless, for the purpose of defeating their creditors. But, because Mrs. Pelanne was induced by these designing men to buy an interest in the store and to form a partnership with Meredith, a party interposed, does it follow that her title to a share of the store was a simulation, in the face of evidence that she paid a real consideration therefor? Is an actual contract of sale to be treated as a simulation, because the object of the contract had previously been acquired by the vendor under a simulated transfer? We think not. Mrs. Pelanne may, perhaps, be guilty of a constructive fraud in thus

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dealing with these dishonest men and obtaining a preference over other creditors, but of this the plaintiffs can not inquire in this form of attack.

Her contract with them was a real one; it is subject to the rules governing actual contracts, and can not be treated as a simulation.

The fact that she continued to hold the notes which the defendants had given her for borrowed money, did not invalidate her engagement in purchasing an interest in the store, because after the purchase, these notes, being part of the consideration, ceased to be valuable to her; the debt which they evidenced having been settled, she might at any time be compelled to surrender them.

But the plaintiffs insist that as evidence of fraud was received without objection, the case was tried on that issue; and that it has been decided that, where the parties try the question of fraud, the opponent can not afterwards demand that the seizing creditors be compelled to resort to a revocatory action; and they cite *Dejean v. Blacketer*, 13 An. 595, and *Stewart v. Scudder*, 10 An. 216, as authorities on that point.

It is true, evidence of fraud was received, but, from the written opinion of the judge *a quo*, we think the case was not tried by the parties on that issue, for he says no fraud was pleaded. The case referred to in 10 An. 216, is not in point. In *Dejean's* case, 13 An. 595, where the absconding debtor's property was attached before any consideration was given for the pretended sale, there is an express recognition by the court of the settled jurisprudence of this State, that, where an actual title has passed, accompanied with possession, its validity can not be tested by attachment or seizure, but a direct action must be brought to avoid the contract as fraudulent. In that case, however, it was held that, as the answer to the opposition set up fraud and simulation and prayed that the sale be annulled, and as no exception was made as to the regularity of the proceedings, and as the parties to the suit had tried the question of fraud, the court felt it to be their "duty to inquire if the sale was fraudulent, and not to reverse the decision on the ground that the party ought to have instituted a revocatory action." * * In the case before us it does not appear that there was a waiver of technicalities, as in that case, by the parties trying the question of fraud in the court below. Nor do we find, in the answer of the plaintiffs to the opposition, a prayer that the sale be annulled for fraud, as there was in the case last referred to.

The case before us was tried with the other oppositions, and it can not fairly be said that the opponent, Mrs. Pelanne, consented to try the question of fraud with the plaintiffs; especially as she insisted that her demand was a distinct suit and was entitled to be tried separately, and, for fear of prejudicing her rights, took a bill of exceptions to the ruling of the court requiring all the oppositions to be tried together.

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We see no reason in the case before us to depart from the rule of practice applicable to actual contracts sought to be annulled for fraud.

Our conclusion is, that the opposition of Mrs. Pelanne was well taken, and that she has been damaged to the extent of her interest in the contents of the store 147 Canal street, and should be indemnified by a judgment, as prayed for, against the sheriff and seizing creditors, for her share of the value of the property thus disposed of by the sheriff, and which can not be returned to her. She has failed to show that she has sustained any further damage than the loss of her share of the property sold, which has not been shown to have had a greater value than the price for which it was sold by the sheriff.

The fact that she gave \$12,000 for a share of twelve twentieths in the store on Canal street, on the eleventh of January, 1867, does not prove that her interest in the stock on hand on the twelfth of June, following, when the seizure was made, was worth that sum.

In the absence of other proof, we will presume the value of the goods and the fixtures of the store 147 Canal street, at the day of sale was the price for which they were sold by the sheriff, to wit: \$9576 45; and the amount for which Mrs. Pelanne should have judgment, is for the value of her share of the property thus ascertained, after deducting the privilege claims of the clerks, but not the costs of the sale. We think the privilege of the clerks for their salaries was not lost by the simulated transfers made by the defendants, and they should be paid out of the proceeds in the hands of the sheriff, and of this Mrs. Pelanne can not complain, because in the transfer from Samuels she also assumed to pay them.

We think the court erred in rejecting the claims of Howard and Van Allen on the ground that they were novated; there is no proof that novation was intended by the parties when the notes were given, and it is never presumed. 13 An. 238; 4 An. 509; C. C. 2181, 2188; 4 N. S. 95. As Mrs. Pelanne has not asked that the sale of the sheriff be annulled, we will not so order it; but will allow her judgment for damages, as claimed, without interest, because none has been prayed for, and without a privilege on the proceeds of the sale, because we are aware of no law entitling her to it.

It is therefore ordered that the judgment appealed from be amended by striking out that part thereof in favor of the opponent, Mrs. Pelanne, and it is now ordered that she recover judgment *in solido*, against the sheriff and the plaintiffs herein, for forty-five hundred and eighty-two dollars and forty-four cents, (\$4582 44), being twelve-twentieths of \$9576 45, the amount of the sale, less \$1939 05, the amount of the privilege claims of the clerks. It is further ordered that said judgment be amended by allowing the claim of James T.

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Howard for six hundred and ninety-one dollars and ten cents, (\$691 10), and also the claim of Daniel Van Allen for nine hundred dollars, (\$900), to be paid, each by preference, out of the proceeds of the sale in the hands of the sheriff; and that the seizing creditors be entitled to the balance of the said proceeds. As thus amended, it is ordered that the judgment of the court *a qua* be affirmed.

It is further ordered that Mrs. Pelanne pay costs of plaintiffs' appeal, and that plaintiffs pay costs of the appeals of the opponents, Howard and Van Allen.

No. 1736.—C. CASE, Receiver, etc. v. S. HENDERSON et al.

The holder of a check, drawn by a third party on a bank, has no action against the bank in case of refusal to pay. Therefore he can not oppose such check in compensation to his note held by the bank.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. D. Rouse*, for plaintiff and appellee. *Breaux & Fenner*, for defendants and appellants.

HOWELL, J. This is an action on a note by the receiver of the First National Bank of New Orleans against the maker and indorser, to which the plea of compensation is opposed, and is based on a check drawn on the bank by a third party, in favor of, and presented by, the maker, but payment thereof refused.

The first question is, did this refusal give the holder a right of action against the bank on the check? This question is answered in the negative by the United States Supreme Court, in the case of the National Bank of the Republic v. R. J. Millard, No. 211, December term, 1869, where it was fully examined and authorities cited. It was succinctly said: The right of the depositor is a *chose* in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depositary; there is no privity of contract between the holder of the check and the bank or depositary, and without this there is no foundation for an action by the former against the latter. See 2 Selden 412; 5 Bosworth 341; 21 Wendell 373; Byles on Bills, ch. Check on Banker. This principle is recognized in *Poydras v. Delamare*, 13 La. 98.

The defendants, then, as holder of the check, having no right of action against the plaintiff, can not compensate his debt therewith, because it is not equally demandable. C. C. 2205; 3 An. 617; 7 La. 564; 7 N. S. 517

Judgment affirmed.

Mr. Justice Howe recused.

No. 2183.—SAMUEL HIRSCH v. THOMAS P. LEATHERS, et al.

A steamboat that takes goods on board at the port of New Orleans, and gives a bill of lading obligatory to deliver the goods at a given point or place on the Yazoo river, not on the route or line of the steamer, with the reservation of the privilege of transshipment, is liable in case of loss or failure to deliver the goods according to the contract. This liability is the same, whether the loss occurs before transshipment or afterward; in the latter case, the second vessel is as much theirs as the first, and the liability is the same as if the loss had occurred on the first vessel.

APPEAL from the Fourth District Court, parish of Orleans.
Theard, J. Clarke, Bayne & Renshaw, for plaintiff and appellee.
McCay & Luzenburg, for defendant and appellant.

TALIAFERRO, J. This is an action against the captain and owners of the steamer *Magenta* to render them liable in damages, to the amount of a thousand dollars, for the loss of a shipment of goods made by the plaintiff, who alleges that the goods were delivered. The answer is a general denial. The plaintiff obtained judgment as prayed for in the court below, with legal interest from judicial demand, with privilege on the steamer, her tackle and furniture. The defendants have appealed. It is shown that at the time the shipment was made, the steamer *Magenta* was a packet, running between New Orleans and Memphis, and advertised to take freight and passengers for Yazoo river, with the privilege of reshipping. The plaintiff, in October, 1866, shipped a bill of goods by the *Magenta* from New Orleans to Sidon, on the Yazoo river. The goods were transferred at Vicksburg to a small steamer called the *Myrtie*, to be carried from there to Sidon. Before reaching Sidon the small steamer struck a snag, by which a hole was made through her bottom, causing her to sink in a very short time. The goods on board were sent in a damaged condition to Greenwood, a point on the Yazoo above Sidon, and sold. The plaintiff's goods were not insured.

The evidence, we think, entitles the plaintiff to recover. It is shown by the testimony of an old and experienced steamboat officer, the captain then of a steamer, and who had been in that capacity on many boats previously, that the small boat upon which the plaintiff's merchandise was transhipped, was utterly unseaworthy. He states that he was on board of her on her second trip before the last she made, for the purpose of examining her, at the request of a friend who was disposed to buy the boat, if found suitable. This witness states, and his testimony is in no manner impugned, that he went into her hold and found thirteen or fourteen of her floor timbers broken and splintered up, which impaired the strength of the boat; that the *Myrtie* was a very weakly built boat and in a very frail condition on the trip on which she sunk, and previously. The witness thought she was not seaworthy, and that she was liable to go to pieces by the working of her machinery. He stated that the person in charge of the

Hirsch v. Leathers et al.

Myrtie during the trip on which she sunk, was not competent to navigate her as a master; that he was only competent as a clerk; that the boat had no regular master; the witness was applied to by one of the owners of the Myrtie to take charge of her, but declined because he did not consider her safe. This evidence is so clear and direct, and given after a special examination of the boat, made at a very short time preceding her last trip, that it can not be counterpoised by the certificate of the Inspector, given six months before at Cincinnati, and the statement of the officer in command at the time the boat sunk. In fact the testimony of the latter does not conflict in any material manner with the testimony of the principal witness called in behalf of the plaintiff. True, he says he examined her very particularly, and knew she was in every way sound, but he also said the Myrtie was a light boat, lighter than he would have built her; and, on cross-examination, stated that on the down trip, a few days before receiving the goods from the Magenta, the Myrtie rolled over a log and broke seven or eight timbers, and soon afterwards that he had the cracked timbers spliced and spiked.

The privilege of transshipment stipulated by the carriers by no means exonerates them from their obligation to deliver the goods at the point named in the contract of affreightment. They were bound in reshipping to employ a seaworthy vessel, and as to their liability the second vessel is considered as much theirs as the first. Abbott on shipping, 6 An. 544.

Judgment affirmed.

**No. 2906.—THE STATE ex rel. PONTCHARTRAIN RAILROAD COMPANY
v. THE JUDGE OF THE EIGHTH DISTRICT COURT.**

In this case an injunction was granted restraining the city of New Orleans from destroying or removing the Pontchartrain Railroad depot. The city obtained an order dissolving the injunction on bond. The railroad company asked for an appeal from the order dissolving the injunction on bond, which the court *a qua* refused on the ground that no irreparable injury would follow.

Held by the Supreme Court—That the allegations in the petition for injunction being taken as true, an irreparable injury would follow, because the company would, in case it was decided in their favor, be driven to another action on the bond to obtain their rights; that an appeal would lie in all cases from an interlocutory decree where an irreparable injury would follow.

APPPLICATION for mandamus. *O. M. Emerson*, Judge of the Third District Court, presiding, in place of *H. C. Dibble*, Judge, absent. *Lea, Finney & Miller*, for relators.

WILY, J. This is an application for mandamus to compel the judge of the Eighth District Court, parish of Orleans, to grant a suspensive appeal from an order permitting the defendant, in an injunction suit, to dissolve the injunction on bond, under art. 307, C. P.

23	51
52	106

23	51
107	389

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d120	746

State ex rel. Pontchartrain Railroad Company v. Judge of the Eighth District Court.

It appears that the relator, the Pontchartrain Railroad Company, sued the city of New Orleans, alleging that by its charter and also with the assent of the city of New Orleans, it acquired a certain franchise, more than thirty years ago, and the same was to be perpetual, to wit, the right to construct a railroad, a depot and other necessary works, "in the street, road or walking avenue which lines the space of ground reserved by Bernard Marigny, and known under the appellation of Marigny Canal, at the period when he established the old and the new suburb, starting from the bend of said canal to Levee street."

It is also alleged that in pursuance of this right the railroad was built, together with the depot and other works, more than thirty years ago; and that the city of New Orleans is about to remove these works and dispossess the company of its franchise. Upon these averments the writ of injunction was issued.

The order, sought to be appealed from, permits this injunction to be dissolved on bond, so far as it restrains the city of New Orleans from removing or causing to be removed all constructions of said company in said avenue, except the tracks of the railroad.

The complaint is, that this order will permit the city of New Orleans to remove the depot and other constructions necessary for the operation of the railroad, and will, in effect, deprive the company of the enjoyment of its franchise; that it works an irreparable injury.

In considering the question, we must take these allegations as true. If the city of New Orleans removes the depot and other buildings belonging to the said company from the place occupied by them, and where the company has the right to have them, it will commit a trespass, and an action for damages will arise in favor of the company and against the city of New Orleans.

If these constructions are removed, the present suit will not end the litigation between the Pontchartrain Railroad Company and the city of New Orleans, if decided in favor of the former; another suit, to wit: an action for damages, will have to be instituted in order to adjust the rights of the parties.

In contemplation of law it would be an irreparable injury thus to compel the plaintiff in injunction to resort to an action for damages in order to have his rights adjusted.

In *The State v. The Judge of the Fifth District Court*, 12 An. 455, a case directly in point, it was held that to permit the dissolution of the injunction on bond, may have "the effect to compel the plaintiff to institute a new action on the bond after the determination of this suit. It may so change the condition of parties to the present suit, that the final judgment in the case will not end the controversy. * * *

Orders producing such effects are considered as working irreparable

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injuries. C. P. 566; *Hyde v. Jenkins*, 6 L. 435; *Gossett v. Cashell*, 14 L. 245; *Taylor v. Penrose*, 12 L. 137; *Comstock v. Paie*, 15 L. 481; 2 R. 342. As a question of law merely, it seems to result from the authorities cited that the plaintiff is entitled to appeal."

In *White & Trufaut v. Carznave*, 14 An. 57, it was held "that where the consequences of an interlocutory order are such that they can not be remedied by a final decree, and the party will be driven to another action to obtain his rights, it is an irreparable injury, from which he may appeal."

It is therefore ordered that the mandamus herein be made peremptory, and the judge be required to grant the appeal as prayed for. It is further ordered that the city of New Orleans pay costs of this proceeding.

No. 2161.—JOHN T. MICHEL v. SHERIFF PARISH OF ORLEANS, et al.

A motion to dismiss an appeal will not be entertained if the documents offered to prove a voluntary execution of the judgment show that the right to a devolutive appeal is reserved.

In this case a horse was in the possession of the sheriff under a sequestration issued at the suit of *Ware & Son v. Wilson*, in the Second Judicial District Court, parish of Jefferson. Burnett intervened and claimed a privilege on the horse. The sheriff, with the consent of the intervenor, transferred the horse to a livery stable in New Orleans for safe keeping. The suit of *Ware & Son* was, by consent, transferred to the Sixth District Court, parish of Orleans. While this suit was pending and the horse under seizure, the intervenor brought a separate action in the Fifth District Court, parish of Orleans, and obtained judgment on default, on which he caused the horse to be seized. Held—That the intervenor, having consented to the transfer of the horse to New Orleans by the sheriff, and having caused a second seizure to be made while he was still a party to the suit in which the first seizure was made, he could not question the validity of the possession of the sheriff under the first seizure and all that he could effect by his execution, was to levy on the property in the possession of the sheriff, subject to the first seizure.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Brice & Mitchel* and *W. S. Scott*, for plaintiff and appellee. *Semmes & Mott* for defendant and appellant.

HOWELL, J. The defendants have appealed from a judgment maintaining an injunction and staying the sale of a certain horse under execution in the suit of *J. J. Burnett v. J. G. Wilson*.

The motion to dismiss can not prevail, because, if we can properly look into the documents offered to prove the voluntary execution of the judgment, we find among them the written consent of both parties that the action taken by Burnett, one of the appellants, should not prejudice the right to a devolutive appeal.

On the merits, the material facts are, that the plaintiff, as sheriff of the parish of Jefferson, had possession of the horse in question, sequestered in the suit of *Ware & Son v. J. G. Wilson*, instituted in the District Court for the parish of Jefferson, in which suit Burnett, the real defendant in this suit, intervened, claiming a privilege on and

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pledge of said animal. The suit was transferred, by consent of all parties, to the Sixth District Court in New Orleans. While pending in Jefferson, the sheriff, for the better care and greater safety of the property, as stated by him, transferred it to a livery stable in New Orleans, after which Burnett, while his intervention in the suit of Ware & Son v. Wilson was still pending, brought suit in the Fifth District Court for the parish of Orleans against Wilson on the same cause of action, obtained judgment on default, and upon Wilson's waiving the delay for appeal caused the horse to be seized under his execution. When he instituted this suit and caused this seizure to be made, he was still a party to the suit of Ware & Son v. Wilson, and knew of the contest going on therein in regard to the legal possession by the sheriff of this horse, and whether or not the said sheriff rendered said horse liable to seizure by *third persons* by sending him out of his bailiwick, Burnett, who had voluntarily made himself a party and claimed a right upon the animal in the possession of the sheriff by virtue of a writ of sequestration, could not disregard that possession. And further, the evidence leads us to believe that it was with the consent of Burnett that the horse was sent by the sheriff of Jefferson to the city of New Orleans, to be there kept for the latter, as it seems to have been their wish, as well probably of others, that the horse should be exhibited at a fair in New Orleans, and they were all willing to take the risk of such unusual proceedings. We conclude that, as to the parties to this action, the sheriff of Jefferson had the legal possession of the horse in question, at the time the defendant, Burnett, caused the seizure to be made under his execution, and the most he could do, in any event, was to levy his seizure in the hands of the said sheriff. In this view, the judgment of the court *a qua* is correct.

Judgment affirmed.

 1136.—E. A. YORKE & Co. v. S. W. SCOTT & Co.

The exception that the petition discloses no cause of action, if not made and passed upon in the lower court, will not be noticed on appeal, nor will objections to the admissibility of testimony, which has not been excepted to in the court *a qua*, be considered on appeal.

APPEAL from Third District Court, parish of Orleans. *Fellowes, J. E. D. Craig*, for plaintiffs and appellees. *Cooley & Philips*, for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment or confirmation of a default against them.

The proof in the record satisfactorily establishes the correctness of the account on which the suit is founded.

As to the objection that the petition discloses no cause of action, we will remark that the exception was not pleaded by the defendants;

that we can only examine and revise the issues presented to the court of the first instance, and do not propose to consider issues raised only in the brief of counsel.

As to the objection that the depositions, received by the court to prove the demand, appear to have been taken by the clerk before the trial, and not in open court, we will observe that there was no bill of exceptions taken to the admissibility of the evidence, and therefore we decline to consider it.

This question was examined in *Brander, Williams & Co. v. Goodwin*, and another, 6 An. 521, a case directly in point, in which it was held that "where a judgment by default was confirmed upon testimony sworn to before the deputy clerk, but his attestation does not show that it was taken in open court, it is liable to objection; but the objection will not be examined by the Supreme Court, unless brought before it by bill of exceptions or in some other legal manner; and it forms no excuse for not taking the bill of exceptions, that it was a confirmation of a judgment by default, as the defendant should have been present to protect himself from the effects of illegal testimony."

On this point we consider the jurisprudence settled.

Judgment affirmed.

2955.—THE STATE OF LOUISIANA v. GEORGE FRITZ, alias GEORGE FRY.

In a criminal trial, on an indictment for forgery, a paper or document, shown to be in the handwriting of the accused, which has no relation to, or connection with, the document forged, is not admissible in evidence to prove by a comparison of the handwriting, that the forged document is in the handwriting of the accused.

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A PPEAL from the First District Court, parish of Orleans. *Abell, J. Simeon Belden*, Attorney General for the State. *J. J. Foley*, for defendant and appellant.

WILLY, J. The defendant having been charged with, and tried and convicted of, the crime of forgery and sentenced to imprisonment at hard labor for four years, has appealed.

In order to prove that the order for the delivery of the goods, charged to have been forged, was in the handwriting of the defendant, the district attorney was permitted to introduce and offer to the jury another paper or writing, not on the same subject matter and irrelevant to the issue, for the purpose of instituting a comparison of handwriting, and thereby proving that the order, alleged to be forged, was in the handwriting of the defendant. With regard to said writing, so offered to the jury for the purpose of comparison, a police officer testified that on the thirtieth April, 1867, and while the defendant was in duress for some other offense, said officer handed the defendant a pencil and paper, and ordered him to write down such words as said officer should

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dictate; that the defendant did as ordered; that said officer kept said writing in his possession for over a year, and it was the same paper that was offered to the jury for the purpose of instituting the comparison. The above facts are set out in the bill of exceptions which was taken by the defendant to the introduction of said paper for the purpose only of comparison of handwriting.

We think the court erred in receiving the evidence.

The rule is settled in England and also in many of the States of the Union, that comparisons of hands by juxtaposition of two writings in order to ascertain whether both were written by the same person, is inadmissible. Mr. Starkie, after announcing that evidence by comparison of hands is not admissible, remarks: "As to the reason of the rule which excludes evidence by actual comparison, it has been said that jurors may not be able to read, and therefore incompetent to make the comparison. This does not appear to be satisfactory; for if the jurors cannot read, they may nevertheless receive the evidence of witnesses who are able to make the comparison. It has also been suggested, that, if such a comparison were to be allowed, an unfair selection of specimens might be made for the purpose of comparison. This, however, would be open to inquiry and observation, and scarcely seems to be a ground for the total exclusion of such evidence; and perhaps, after all, the most satisfactory reason is, that if such a comparison were to be allowed, it would open the door to a great deal of collateral evidence, which might branch out into very inconvenient length. For in every case it would be necessary to go into distinct evidence to prove each specimen produced to be genuine, and even in support of a particular specimen (if the present rule was to be broken through), evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent." 2 Starkie on Evidence, 374, 375, and authorities there cited.

Mr. Phillips also states the existence of the general rule of excluding evidence by comparison of handwritings, and gives the same reasons, remarking, that he considers the best "reason for rejecting such a comparison is, that the writings, intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best serve his purpose; and they are not likely, therefore, to exhibit a fair specimen of the general character of handwriting." He also states, that "within a recent period, a rule has been established, which amounts to a considerable relaxation of the strictness of the law in regard to the direct comparison of handwriting. Upon a question respecting the identity of handwriting, the jury may be allowed to take other papers which have been proved to be the handwriting of the party whose handwriting is disputed—*provided they are part of the proofs in the*

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cause—and may compare them with the disputed writing for the purpose of forming their opinion whether the disputed writing is genuine. The principle on which this relaxation of the old rule has been allowed, is stated to be, that the jury, having the documents before their eyes and being obliged to look at them for another purpose, it would be impossible to prevent their forming some opinion with respect to the papers being like or unlike the disputed writing." * * *

"But," he adds, "it is an established qualification of the last mentioned rule, that documents, irrelevant to the issues on the record, are not to be received in evidence at the trial in order to enable the jury to institute such a comparison." 2 vol. Phillips on Evidence, 255, 256. See also Cowen & Hill's Notes to Phillips on Evidence, pages 1326, 1327 and 1328, and authorities there cited. See also Greenleaf on Evidence, vol. 1, pages 612 and 615, section 578 and section 580.

It is true, American decisions are not uniform on this subject; but as the rule has been so clearly settled and upon the highest authority in England, we think it best to adhere to it.

We are not aware that the question has heretofore been presented to this court for adjudication.

The writing, offered to the jury in this case and received by the court for the purpose of instituting a comparison of handwriting only, was not admissible; and the defendant has been convicted upon illegal evidence.

The other points presented by the defendant are of no force.

It is therefore ordered, that the judgment appealed from be avoided and annulled, and that this cause be remanded for new trial, and to be proceeded in according to law.

3078.—GUSTAVE BOUDREAU v. GERASINE BOUDREAU

In this case it was held that the recording of a sworn statement by the heir was not sufficient to give him a legal mortgage on real estate, which had been sold by the tutor to a third party, prior to the recording of his claim.

A PPEAL from the Parish Court of Lafourche. *Joseph Nicholas*, Parish Judge. *E. W. Blake*, for appellees. *Isaiah D. Moore*, for *S. Meyer*, a third party, appellant.

TALIAFERRO, J. The plaintiff instituted this suit against his father and natural tutor (who, being an absentee, was represented by a *curator ad hoc*,) to require an account of tutorship and to establish the amount due by him as tutor; the plaintiff alleging that his father and former tutor received large sums of money from the succession of his mother and from the successions of two brothers and a sister of

Gustave Boudreau v. Gerasine Boudreau.

plaintiff, who died without descendants; that the tutor has failed to present any account of his administration of these successions, or to pay over to the plaintiff any portion of the proceeds of the same. The plaintiff alleges that, at the time of the death of his mother, his father was in possession of a tract of land and plantation thereon on the Bayou Lafourche, the said land and plantation being community property, acquired during the marriage of his parents. He specifies this tract of land by its boundaries and superficial contents, and claims a legal mortgage upon it, as security for the liabilities to him by the tutor resulting from the said tutorship. It appears that on the twenty-sixth of December, A. D. 1869, in order to preserve the legal mortgage thus claimed against the specified property, the plaintiff caused to be recorded in the mortgage book, kept in the office of the recorder of the parish of Lafourche, an instrument sworn to by him, in which it is stated that his father received from the successions, aforesaid, the sum of five hundred and ninety-four dollars, to which plaintiff was entitled and which the tutor never paid over. This affidavit further sets out that the tract of land before mentioned was sold by his father and former tutor to Solomon Meyer and conveyed by notarial act on the twenty-second of November, 1866, and that the seller in that act declared that he was indebted to the plaintiff as stated; and that this declaration of indebtedness by the tutor is the only evidence, left to him, of his right of mortgage upon the property sold by his tutor to Meyer. The *curator ad hoc* presented an account of tutorship, in which the claim of the plaintiff was recognized for \$679 35, principal and interest, and as entitled to legal mortgage on the land before referred to. An order homologating the account was rendered, and a judgment pronounced in favor of the plaintiff for the sum of \$679 35, with legal mortgage against the land sold to Meyer, as well as all other property then and previously owned by the defendant. A *fi. fa.* issued on this judgment and was returned *nulla bona*. After this judgment was rendered, and without having been a party to it, Meyer appealed.

We are of the opinion that the judgment, so far as it accords to the plaintiff a legal mortgage on the property of the appellant, was rendered upon insufficient evidence, and to that extent it should be avoided. Without, therefore, disturbing the judgment as between the plaintiff and defendant decreeing the indebtedness of the defendant to the plaintiff, it is ordered that it be annulled and set aside so far as it decrees and recognizes a legal mortgage on the property of the appellant, arising from the tutorship aforesaid; that this decree reserves to the plaintiff all rights, if any, that he may have to establish and enforce the legal mortgage he claims against the property now or heretofore belonging to his tutor that may be subject to such mortgage.

Annie C. Diggs v. Maury.

No. 2190.—ANNIE C. DIGGS v. JAMES MAURY.

A lessee can not set up, in defense to a claim for rent, that the building was uninhabitable, and that he has suffered damages to his furniture in consequence thereof. In such a case, the lessee was authorized, if the lessor has failed or refused, to have the necessary repairs made, and deduct the cost from the rent.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Percy Roberts and Hays & New*, for plaintiff and appellee. *L. M. Day and A. Cazabat*, for defendant and appellant.

LUDELING, C. J. The plaintiff sues to recover the rent for a house and square of ground in Jefferson. The defendant filed a general denial, and further alleged the house was uninhabitable, and that in consequence of the want of repairs he was greatly damaged by the deterioration of his furniture, etc.

The plaintiff has proved her claim. The claim of the defendant in reconvention is untenable. If the lessor refused or failed to make necessary repairs, the lessee might himself have caused them to be made, and deduct the cost from the rent, on proving that the repairs were indispensable, and that the price paid by him was just and reasonable. C. C. 2694 [2664]; 4 Rob. 428; 21 An. 714; 22 An. 292.

It is therefore ordered that the judgment of the court *a qua* be affirmed, with costs of appeal.

No. 2068.—C. F. LEX AND WIFE v. THE SOUTHERN EXPRESS COMPANY

To enable a defendant to obtain a continuance of the cause, on the ground that the testimony of a material witness is not in the record, it must be shown that due diligence has been used to procure such testimony.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. W. W. Handlin*, for plaintiffs and appellees. *H. J. Leory*, for defendants and appellants.

HOWE, J. When this case was called for trial in the court below, the counsel for defendants made an application for a continuance on the ground of the absence of the superintendent of the defendants, whom he alleged to be a material witness. The judge refused the continuance, and, proceeding with the trial, gave judgment in favor of plaintiffs, from which the defendants have appealed.

They claim that the judge erred in refusing a continuance. The record, however, does not show due diligence on defendant's part. The suit was instituted March 20, 1868. The answer, a general denial, was filed April 7, 1868. Testimony was taken for plaintiffs by commission during the summer and in the clerk's office in November, 1868. The cause, we presume, was regularly called and fixed for trial at least a week prior to the sixteenth of December, 1868, the day on which the application for a continuance was finally made. The affidavit

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did not show why the testimony of the absent superintendent had not been taken, why he had not been notified to be present, and especially did not state what the defendants expected to prove by him or by any witnesses whom he might furnish. It is quite possible that if this latter statement had been made, the plaintiffs, by proper admissions, would have removed any desire for a continuance.

The plaintiffs' case seems to be fully made out on the merits. They have prayed for damages for frivolous appeal.

It is therefore ordered that the judgment appealed from be affirmed, with costs and with fifty dollars, damages.

No. 2157.—CHARLES CASE, Receiver of the First National Bank of New Orleans, v. A. MARCHAND et als.

The maker of a note in favor of a bank can not urge, as a defense to its payment, that the appointment of a receiver by the government, to liquidate its affairs, was not regular. It is sufficient for the maker to know that a receiver was appointed, who holds the note, and that he will be discharged by paying it.

A bank, by refusing to pay checks drawn upon it, does not incur a liability in favor of the payee. Therefore, the holder of checks on a bank can not, after payment has been refused, plead them in compensation against his note held by the bank or its receiver.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. D. Rouse*, for plaintiff and appellee. *G. Schmidt*, for defendant and appellant.

WYLY, J. The defendant, Marchand, sued as the maker of a promissory note, has appealed from the judgment against him.

The defense is, that the preliminary proceedings, under the national bank act, were not complied with in appointing Case the receiver, and he can not sue as such. Also, before the receiver was appointed, to wit, on the sixteenth or seventeenth of May, 1867, this defendant tendered payment of the note sued on, and the same was refused.

It is no defense to the note for the maker to complain that the receiver, appointed by the government to liquidate the bank to whom the note was given, was not regularly appointed. It is enough for the maker of the note to know that Case was appointed receiver, and as such holds the note on which he is sued, and that he will be discharged by paying it.

In reference to the alleged tender of payment on the sixteenth or seventeenth of May, 1867, we will remark that the bank was not bound to receive it, because the note had not then matured. The fact that the defendant presented checks or drafts on the bank, on the sixteenth or seventeenth of May, 1867, and was refused payment, is of no consequence. The drawee incurs no obligation in favor of the payee by refusing to accept or pay the draft or check.

Case, Receiver of the First National Bank of New Orleans, v. Marchand, et als.

The defendant, as holder of checks which the bank refused to accept, can not compensate his debt due the bank therewith, because there are not two debts equally liquidated and demandable. C. C. 2205. The bank having refused to accept, was not the debtor of the defendant. See Casey, Receiver, v. Henderson et al., just decided.

The plaintiff has asked for damages for frivolous appeal, and we think he should have them.

It is therefore ordered that the judgment be affirmed, with costs. And it is further ordered that the plaintiff have judgment against the appellant for two hundred dollars, damages for frivolous appeal.

Rehearing refused.

2156.—CITY OF NEW ORLEANS v. HOME MUTUAL INSURANCE COMPANY.

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Bonds issued by corporations and owned by the city of New Orleans, do not constitute a part of the franchises of the city, nor are they essential to the existence or proper exercise of the functions of the corporation. A judgment creditor of the city may therefore cause such bonds to be seized and sold in satisfaction of his debt

A PPEAL from Seventh District Court, parish of Orleans. *Collens, J.*
Rufus Waples, Assistant City Attorney, for plaintiff and appellant.
Lacey & Butler, for defendant and appellee.

TALIAFERRO, J. The Home Mutual Insurance Company, having obtained judgment against the city of New Orleans, issued execution and caused to be seized, as property of the city, certain bonds of the Commercial Water Works and of the New Orleans and Jackson Railroad, and was proceeding to sell them, when the city obtained an injunction restraining the sheriff from making the sale.

On trial of the case in the court below, the injunction was dissolved, and five hundred dollars as damages were awarded the defendant. The plaintiff in injunction appealed.

In this court the defendant prays an amendment of the judgment rendered by the court *a qua*, decreeing in its favor eight per cent. interest and twenty per cent. damages on the amount enjoined.

The injunction was prayed for on the ground that the bonds seized have the character of public property, and that an individual creditor can not appropriate to his individual benefit property of that kind destined for the use and benefit of the corporation and of the people. We are referred to the case of *Egerton v. The Third Municipality*, 1 An. 435, and the case of *the Police Jury v. Michel*, 4 An. 84.

These cases, in our view, do not sustain the doctrine contended for. In the former, the principle was elaborately announced that the paramount interests of public order and the principles of government forbade the right claimed by the plaintiff, as a creditor of the corpora-

tion, to seize and sell taxes due to the corporation; that the authority under article 637 of the Code of Practice granted to creditors to seize under execution "all sums of money which may be due to the debtor in whatsoever right," refers exclusively to that class of rights defined and protected by the constitution as the rights of property, and that taxes imposed for the protection of those rights form no part of them. In the latter case cited, the same principle was recognized. The police jury of West Baton Rouge enjoined a seizure, made by a creditor of the parish, of the courthouse, jail, recorder's office, clerk's office and office furniture. The decision was adverse to the pretensions of the seizing creditor. In the case of *Egerton v. The Third Municipality*, our predecessors, following the reasoning and line of argument used by the Supreme Court of the United States in the great case of *McCulloch v. The State of Maryland*, said: "The power to seize the tax in this case involves the power to destroy the corporation; the power to destroy the corporation may defeat and render useless the power to establish it, and that there would have been a plain repugnance in conferring on any individual the right to arrest or impede the action of a constitutional power in the function of government."

The bonds, seized in the case now before the court, can not be regarded as having the same character as that of the tax due the Municipality, or of that of the public buildings in the cases relied upon in the First and Fourth Annuals. They are not essential to the existence of the corporation nor to the useful and proper exercise of its functions. The corporation might be deprived of them without impairing in any degree its capacity to exercise the functions contemplated by the act of incorporation.

We do not think the circumstances require an amendment of the judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

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No. 2173.—*Mrs. M. L. VAUGHN and HUSBAND v. R. TERRELL and Dr. H. F. WADE, Testamentary Executors.*

The action to recover the wages of a person employed as a nurse is prescribed by one-year. C. C. 3534.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Cotton & Levy*, for plaintiffs and appellees. *T. & J. A. Gilmore*, for defendants and appellants.

LUDELING, C. J. This is an action against the executors of Mrs. Lucretia Wade to recover five thousand dollars for services, as a nurse, rendered to the testatrix during her last illness.

Mrs. Vaughn and Husband v. Terrell and Wade, Testamentary Executors.

The defendants have plead the prescription of one year in bar of the suit.

The plea must be maintained. The plaintiffs' action comes within that class designated in the fifth paragraph of article 3534 [3499] of the Civil Code—"Celle des ouvriers, *gens de travail* et de service, pour le paiement de leurs journées, gages et salaires."

Mr. Marcadé says of *nurses, gardes-malades*, "*ce sont des gens de travail, rentrant sous l'article précédent.*" Mar. Prescription, p. 216.

It is therefore ordered, that the judgment of the district court be annulled, and that there be judgment against the plaintiffs, rejecting their demand, with costs of both courts.

No. 2155.—B. L. BRITTON *v.* AYMAR & BRYANT and JEROME BRADLEY & Co.

A depositary is bound, in the absence of any judicial proceedings, to hold the property deposited, subject to the order of the depositor. C. C. 2920, 21 and 29. A depositary can not therefore be held liable in damages, in the absence of proof of fraud, for obeying the orders of the depositor.

In this case, the evidence in the record shows that the plaintiff deposited a lot of cotton in the defendants' warehouse; that a lien was given and recognized by the depositors for the payment of the charges of storage; that the cotton was, two days thereafter, seized by the treasury agent of the United States. Held—That the depositary, not being able to resist the seizure and consequent custody of the cotton by the United States, acting through the Treasury Department, could not be held liable in damages for the failure to deliver it, when demanded by the depositor. *Per curiam*: The fact that the seizure was subsequently released by the authorities of the Treasury Department of the United States, is not to be taken and construed against the depositary. The agents of the Treasury Department are presumed to have acted honestly in the discharge of their duties, and therefore collusion with the defendants, in making the seizure, will not be presumed.

APPEAL from Fourth District Court, parish of Orleans. *Théard, J.* James Brewer and Miles Taylor, for plaintiff and appellant. Billings & Hughes, for Jerome Bradley & Co., defendants and appellees. Lacey & Butler, for Aymar & Bryant, defendants and appellees.

Howe, J. It appears that in December, 1865, the plaintiff was in possession, claiming to be owner of a quantity of cotton, at Camden, in the State of Arkansas; that nine hundred and twenty-five bales thereof were there seized by O. H. Burbridge, an agent of the Treasury Department of the United States, and by him shipped to New Orleans by the steamboats Alabama and May Bruner; that upon its arrival in New Orleans, in January, 1866, it was sequestered by plaintiff in a suit begun by him in the United States Circuit Court against Burbridge, as an officer of the government; that, in virtue of the writ of sequestration, it was taken by the United States Marshal and stored with Jerome Bradley & Co., who seem to have kept a warehouse for the purpose of receiving cotton of this description, and that Jerome

Bradley & Co. advanced a large amount of freight and charges on the same, and held it subject to further orders and to the payment of their charges.

About the first of February, 1866, Jerome Bradley & Co., who had rented the place of deposit, "Orleans Yard No. 2," from the co-defendants, Aymar & Bryant, gave up this yard to their lessors, leaving the cotton claimed by plaintiff on store with Aymar & Bryant, and still subject to the order of themselves, (Jerome Bradley & Co).

On the sixth of March, 1866, the United States Marshal gave an order, addressed to "Orleans Yard No. 2, or Jerome Bradley & Co.," for the delivery to plaintiff or his order of the cotton in question, with the condition that "the press customary charges will be paid by Mr. Britton or his agents, as well as any charges or outlays due by said cotton."

The plaintiff indorsed this order, "Please deliver to Richard Lloyd," and on the seventh of March, 1866, the order was indorsed by one of the firm of Aymar & Bryant, defendants, as follows:

"By virtue of this order, I have this day delivered the within cotton to Benjamin L. Britton, who has delivered the same to Richard Lloyd.

For Merchants' Press

E. K. BRYANT."

It appears as matter of fact from the record, that this last indorsement was made subject to the condition expressed in the Marshal's order, and with the understanding that the claims of Jerome Bradley & Co., the depositors of Aymar & Bryant, should be satisfied before the cotton should be actually given up to the plaintiff or his agent, Lloyd. There has been some discussion between counsel as to whether this collateral agreement could be established by parol. It suffices to say that the testimony on this point was received without exception.

On the same day, March 7, 1866, Jerome Bradley & Co. notified Aymar & Bryant, in writing, that they must not give up to plaintiff the cotton, as he refused to pay the freight and charges. On the next day this notice was repeated, in writing, with a statement of the amount of charges. On the day following, March 9, 1866, the defendants, Aymar & Bryant, were notified by the Collector of Customs, acting for the Secretary of the Treasury, to hold this and all other cotton claimed by plaintiff, and inspectors were detailed to compel obedience to this order. On the twelfth March, 1866, B. F. Flanders, General Agent of the Treasury, ordered Bradley to hold all cotton in his hands, claimed as government cotton, and Bradley, in turn, notified Aymar & Bryant to the same effect.

On the tenth of April, 1866, Flanders, as General Agent, notified Jerome Bradley & Co. that he was ready to adjudicate and decide the case of the plaintiff's cotton—"the Britton cotton." On the twelfth April, Burbridge, as "Supervising Special Agent of the Third Agency"

of the Treasury, notified Jerome Bradley & Co. to "hold the cotton claimed by B. L. Britton, marked B. L. B. and other marks, subject to my official order, any release or order to the contrary notwithstanding." On the same day, Jerome Bradley & Co. notified Aymar & Bryant, in writing, and at considerable length, to retain the cotton. On the seventeenth of April the cotton was released by Burbridge, as Supervising Special Agent, and Jerome Bradley & Co. gave an order to Aymar & Bryant, in favor of plaintiff, for its delivery to him, and it was delivered. Thereafter, this action was instituted to recover from Aymar and Bryant and Jerome Bradley & Co., as wrongdoers, *in solido*, damages for

First—Depreciation in price of cotton from March 6 to April 17, 1866.

Second—Value of difference in quantity delivered to defendants and that restored by them.

Third—Injury from bad storage.

Fourth—Damages by substitution of rubbish for good ordinary cotton.

After trial the court below rejected the demand of plaintiff and also a reconventional demand for damages set up by Aymar & Bryant, and the plaintiff alone appealed.

It seems plain, from the facts above stated, that Aymar & Bryant were the depositaries of Bradley & Co., and were bound, in the absence of a judicial proceeding on the part of Britton, to hold the cotton subject to the order and control of the depositors. C. C. 2920, 2921, 2926; Pothier Depot, No. 43; 7 M. 284; 2 N. S. 284; 6 La. 34; 21 An. 596.

In the absence, then, of proof of fraud and collusion, we must think that Aymar & Bryant can not be held in damages for obeying the orders of the depositors, Jerome Bradley & Co. But, even if the facts do not justify the application of this familiar principle of the law to the whole case, there is another element which perfects the defense. It will appear from the dates above recited that the detention of the cotton, whether by Aymar & Bryant or Bradley & Co., for the purpose of enforcing a settlement of an alleged claim for advances and charges, lasted but two days, March 7 and 8, and that on the ninth the government came in to assert a claim by a power which could not be resisted; and that this irresistible power of the United States, acting through the Treasury Department, reinforced by the Department of War, held the cotton until the seventeenth of April, 1866, when it was finally released. It is true that no military guard was placed over it, but that was not necessary. A large military force was present, commanded by a vigilant general, and the war had not yet been declared at an end by the political department of the government.

 Britton v. Aymar & Bryant and Jerome Bradley & Co.

The agents of the treasury, engaged in the important business of collecting and saving for the people of the United States the large quantities of cotton surrendered by the defeated insurgents, are presumed to have acted honestly and regularly in this case, and there is no evidence to rebut this presumption and to show that their seizures were made by collusion with the defendants. During the two days of detention, which may be, perhaps, ascribed to the acts of the defendants, it does not appear that there was any decline in the value of the cotton. At the most, then, it was *damnum absque injuria*. The decline which took place afterwards and up to April 17, must, so far as we can perceive, be accepted by plaintiff as one of the misfortunes incident to a time of civil turmoil.

We have thus far directed our attention chiefly to Aymar & Bryant. The detention by the Treasury agents, from March 9 to April 17, is equally a defense for Bradley & Co., there being no evidence that these official seizures were made by collusion with Bradley & Co.

The other items of damage claimed are not clearly established.

Judgment affirmed.

No. 2191.—MARGARET LOVE, Testamentary Executrix v. R. L. ADAMS & Co.

The defendants, R. L. Adams & Co., were sued for a balance due Josephus Love. R. T. Jennings, one of the firm of R. L. Adams & Co., averred that the indebtedness of Love, if it ever existed, was due by the former firm of R. L. Adams & Co., of which he was not a member, and not by the present firm, of which he is a member and against whom suit is brought. The evidence shows that at the time Jennings entered the firm of R. L. Adams & Co., he was made acquainted with the debt standing against the former firm in favor of Love; that he made no objection thereto, but, on the contrary, made provision for its liquidation by the new firm. Held—That these acts on his part amounted to an assumption of this liability as a partner.

APPEAL from the Seventh District Court, parish of Orleans. *Ollens, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *Hyams & Jonas*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, as executrix of her husband, Josephus Love, sues the defendants on an instrument of writing in their hands, signed by Josephus Love, acknowledging the receipt by him of one thousand dollars in part payment of a balance owing to him by R. L. Adams & Co., leaving at the date of the instrument (twenty-ninth May, 1866,) due Love \$4264 96, to be paid by them in equal installments on the first of January and first of April following, without interest. The plaintiff prays judgment for this balance due, subject to several credits specified in her petition. R. T. Jennings, one of the defendants, answering for himself alone, specially denied that the firm of R. L. Adams & Co., of which he was a member, was ever indebted to Josephus Love or his estate. He avers that the indebted-

Margaret Love, Testamentary Executrix, v. Adams & Co.

ness alleged, if it ever existed, was by the firm of R. L. Adams & Co., composed of R. L. Adams and J. J. Michie, to which the firm now sued are successors. He denies that his firm, composed of R. L. Adams and himself, ever received any consideration whatever for the alleged indebtedness. He also pleads the prescription of three years. Adams, the other defendant, made no defense. Judgment was rendered *in solido* against the defendants for the amount claimed, subject to admitted credits.

From this judgment, Jennings alone appealed.

It appears in proof that the original firm of R. L. Adams & Co., composed of Adams and Michie, owed Love, in April, 1860, a debt exceeding ten thousand dollars. In July, 1860, the co-partnership of R. L. Adams and R. T. Jennings was formed. It appears, also, that several of the accounts standing on the books of the first firm of R. L. Adams & Co. were transferred to the books of the second firm having that style, and among those accounts so transferred was the account with Love. Jennings, in his own testimony, says that these transfers were made without his consent. This statement, Adams, the other partner, in his testimony, denies. He says that Jennings made no objection to the transfer. The partnership last formed expired, by its own limitation, on the first July, 1862. In 1861, Jennings paid Love, on account, \$5000, and we infer that the entry of this payment was made on the books of the firm of R. L. Adams & Co., of which Jennings was a partner. In 1867, after the death of Love, a person instructed by the executrix called to see the state of the account, and Jennings directed the book-keeper to make it out, and the account was accordingly furnished. He knew that the account stood upon the books of the firm, of which he was a member, for he says himself that he protested against its being placed there. He was instrumental, in 1866, in adjusting the business with Love, who had threatened a law suit. He arranged the settlement with Love, which resulted in the payment of the thousand dollars and the giving of the instrument of writing upon which this suit is based. We are satisfied that the transfer of Love's account to the books of the firm of which Jennings was a partner, was with his consent. The reason for that consent seems sufficiently clear, namely, that the partners of the new firm desired to retain the customers of the former firm. Jennings says, in his testimony: "We expected to do business with some of the parties whose accounts were transferred." We consider that Jennings participated in the matter and became bound thereby. His plea of prescription can not avail him. We think the judgment appealed from correct.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

No. 2178.—L. LASTRAPES et al v. ROSA ROCQUET.

The rule *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum* may be urged as a means of defense, but it can not be used as a weapon of attack. Therefore a purchaser of property, when sued for the price, may urge in defense the redhibitory defects, the diminution in quantity and the like, although his right to recover by direct action for such cause be prescribed.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Armand Petot*, for plaintiffs and appellants. *Miller & Huntington*, for defendants and appellees.

HOWELL, J. The plaintiffs seek to have a note for \$10,000, due thirty-first March, 1862, and the mortgage securing its payment, given for the last installment of the purchase price of a plantation and slaves in St. Landry, canceled and extinguished, on the ground that the payments made far exceed the value of the land, improvements and movables purchased by them, the alleged proportion being \$60,000 for slaves and \$20,000 for the land, improvements and movables, and the total paid being \$60,000. The defense is that the demand is unfounded in law; that if admissible, the proportion is as three-sevenths for the slaves to four-sevenths for the land, etc.; that the whole loss should not fall on the note, which fell to her share in the partition among herself and co-heirs; that plaintiffs are liable for the hire of the slaves, if they are released from payment of their price; and she prays the dismissal of the demand or its reduction, and, in reconvention, claims her proportion of \$50,000 for the hire of the slaves; and also the amount of said note with a recognition of her mortgage. To the reconventional demand the prescriptions of three, five and ten years and the constitutional inhibition were pleaded.

All the evidence, touching the relative value of the slaves and the other property, was introduced by the plaintiffs, and it sustains the proportion set out in their petition. The only question for our decision is that of prescription, to which the defendant opposes the maxim, "*Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.*"

This appears to us a misapplication of the rule invoked, and one which must tend to render the laws of prescription inoperative. If the position taken by defendant be correct, the holder of a mortgage note actually prescribed has the right to enforce its payment, because the maker seeks to relieve his property or credit from the shadow cast upon it by the outstanding of such note. The rule is intended as a shield, and not as a weapon of attack; as, when a purchaser is sued for the price of property, he may set up a redhibitory defect, deficiency in quantity, and the like, although the right of a direct action, arising from such cause may be prescribed.

The defendant's right to demand payment of the note: Her cause of action does not grow out of the right or cause of action on the part of

Lastrapes et al v. Rosa Rocquet

the plaintiffs. It is an original, independant right, growing out of the obligation contracted by the plaintiffs in her favor, and that of plaintiffs rests on events occurring since the origin of said obligation, and which they say have extinguished that obligation. Defendant's attempt seems to be a reversal of the ordinary application of the rule. No question is raised by her as to any renunciation of acquired prescription, and no interruption is alleged or shown.

Judgment affirmed

No. 2954.—THE STATE OF LOUISIANA v. HUGH O. AMES.

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Article 911 of the Civil Code, which provides that, when the deceased has left neither lawful decendants nor lawful ascendants nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, does recognize the State as an heir, entitled to inherit, in the absence of all other heirs. ~~Therefore the State, not being an heir under any circumstances, is not entitled to notice of the probating of a will, as provided in article 935 of the Code of Practice.~~

In considering the question of the authenticity of an olographic will, courts will not give effect to the novelty of the testator in the selection of the place of deposit of the paper containing his last will, nor to the whims and vagaries in the dispositions of the last will and testament. But, on the contrary, they will look to the evidence tending to establish its genuineness, and if the document produced is shown by the evidence to be the last will and testament of the deceased, it will be so held, notwithstanding the circumstances surrounding its discovery, and the dispositions thereof may reasonably excite suspicion of its being the veritable act of the testator.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Simeon Belden*, Attorney General, and *J. W. Thomas*, for the State, appellee. *C. Roselius* and *Alf. Philips*, for defendant and appellant.

TALIAFERRO, J. This is a suit to annul a judgment confirming an act of last will and putting in possession the party named therein as universal legatee. The action is brought in the name of the State on the alleged ground that the will probated is a forgery, and that the succession, pretended to be bequeathed by it, belongs of right to the State, in default of there being any one legally entitled to succeed. The answer is a general denial.

There was judgment in the court below, annulling the order probating the will and ordering its execution as having been rendered contrary to law. The defendant has appealed.

The grounds taken in behalf of the State are: That the order granted for the registry and execution of the will was rendered *ex parte*, and without the notice required by article 935 of the Code of Practice; that it was rendered on insufficient evidence; that the document, presented for probate and purporting to be the olographic will of Joseph Field, is spurious and forged, never having been written or signed by him.

Joseph Field, the alleged testator had been for more than fifty years a resident of this country, and, during the greater part of that time, a

citizen of New Orleans, where he died, at an advanced age, on the twenty-second of October, 1862. He had acquired an estate appraised at his decease to over sixty thousand dollars, and he was free from debt. Many years ago he had a partner in business named Jesse Cowand, with whom he lived on terms of intimacy and friendship during the life of the latter. After the death of Cowand, Field, it seems, lived most of the time with Cowand's children, of whom there were several daughters married, and two or three sons. Field was never married, and had no known relatives of any description. He appears to have been attached to the children of his old friend and partner, and the evidence makes it pretty clear that he intended to leave his property among them at his death. This was the belief of the family generally, and the succession he left has proved an apple of discord among them, and given rise to dissensions and improper feelings, which, unhappily, are often engendered under similar circumstances.

At the time of Field's death, a most diligent search was made for the expected will, but without effect. An administrator was appointed, who had the estate under his charge about two years, when he died, and, during the pendency of proceedings to appoint a successor, an instrument of writing, the one which is the subject of this litigation, was found and presented for probate as the last will and testament of Joseph Field. The circumstances under which, after a lapse of more than two years, this instrument is said to have been found, are somewhat novel, and, it is contended on the part of the plaintiff, sufficient to stamp it as the offspring of fraud and collusion. It is shown to have been found attached by paste or mucilage to the under side of the tray or till of a common leather trunk which had been in the possession of the defendant, Ames, ever since the death of Joseph Field. The wife of Ames is, by this strangely discovered will, named the universal legatee of the testator. The act is dated thirteenth October, 1862, during the last illness of Field, who, as we have before seen, died on the twenty-second of that month. It is dated "No. 422 Dryades street," New Orleans.

Amanda M. Cowand, the wife of Ames, was one of the daughters of Jesse Cowand. Subsequently to the probate of the will she died, and by act of last will constituted her husband, the defendant, universal legatee of her estate.

Recurring, now, to the grounds set up on the part of the State for annulling the will, we take the first—that the order for the probate of the will was *ex parte*, and rendered without the notice required by article 935 of the Code of Practice. That article provides that, "the party praying for the opening and proof of the will shall cause to be summoned the number of witnesses possessing the qualities required

for such proof, and if the presumptive heirs of the deceased, or any of them reside in the place, he shall give them notice, in writing, that they may attend, if they think proper, at the opening and proof of the will." Within the meaning of this article, it is argued that the State may become the presumptive heir of a deceased person, and that it always is the presumptive heir, when more than one year elapses without some one, having a better right, presents himself to claim it. Reference is made to article 911 of the Civil Code, which provides that, "when the deceased has left neither lawful descendants nor lawful ascendants, nor collateral relatives, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed." This article, it is contended, recognizes the State as an irregular heir, and that, more than one year having elapsed without any heir to the estate of Field having presented himself, the State had become the presumptive heir, and was entitled to notice of the application for probate of the will. This doctrine we are not able to assent to. In no proper sense, we apprehend, can the State be styled an heir, when, in the absence of heirs of every denomination by law capable of succeeding by inheritance, the property of the deceased owner becomes vested in the public, and is at the disposal of the government. On this point Demolombe says: "The fourth law of the Code of Justinian, *De bonis vacantibus* declared, *Bona vacantia mortuorum tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea vel juris titulo legitimum relinquerit intestatus haeredem.*" Such, then, is the true cause of acquisition to the profit of the State; the State is not in reality an heir or a successor, in the technical sense of this word, for it acquires by the title of *escheat*; that is to say, precisely in virtue of a title which supposes, necessarily, that there are no heirs; which caused Bacquet to say that, when a man dies without heirs, the goods left by his death *non vocantur bona hereditaria sed vacantia nominantur*. In a word, the State exercises in this matter the eminent right of sovereignty, in virtue of which it appropriates all property without a master which is found within its territory." Vol. 14, pp. 259 and 260.

It is objected that the order establishing the will was rendered upon insufficient evidence. Three witnesses were sworn. They all testify that they recognized the will to be entirely written, dated and signed by Joseph Field, their knowledge being derived from having often seen him write and sign his name. Upon the trial of the case, these witnesses were re-examined, and from the result the counsel on the part of the plaintiff deduce their entire ignorance of the handwriting of the testator. We do not find that the re-examination of the witnesses warrants this deduction. Two of the witnesses, the defendant and Aken, upon strict interrogation, say unqualifiedly that they had

seen him write, and they specify the times and occasions on which they saw him write. Aken represents Field as a man having but few correspondents, and who never wrote except on business or to some of the Cowand family. Ames says substantially the same thing. "I think," said this witness, "he wrote but seldom. He had but few correspondents; I know of no one in the city he corresponded with. He had some correspondence with the secretary of the Southern Pacific Railroad Company; he was a large stockholder; I saw him write these letters; this was in 1858 and 1859. * * * I never saw him write letters to any other parties; I think his correspondence was very limited; he wrote three in my presence, which I read; the subject matter of these letters was dictated by me; I mailed the letters. He wrote two checks between 1858 and 1859." The other witness, Liebrook, seems to have been but little regarded by either party in this contest, and the record abounds with proofs of his tergiversations and recklessness. We see nothing in the testimony of the two witnesses, Ames and Aken, that shows they were ignorant of the handwriting of Field. The evidence, however, shows that they could not have seen him *often* write and sign his name, but it also shows that Field did not often write. In the matter of the succession of Daniel Clark it was held that "the rules for the opening and proof of testaments, commencing at article 1649 of the Code, do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may not be inapplicable, and the judge may not receive, in extraordinary cases, other equally satisfactory proof that the requirements of the law have been fulfilled. If a will is valid, the irregular proof on which it may have been admitted to probate, will not be permitted to affect the rights of the parties under it." 11 An. 128.

The counsel for the State insist with much earnestness, that on the thirteenth day of October, 1862, the day on which Field was removed from the house of Mrs. Herrick, No. 422 Dryades street, being the day on which the will was dated, the testator was, from his great prostration by disease, physically unable to write and to place the will in the position in which it was said to be found. It seems that Field was removed about nine o'clock A. M.; that he was then greatly enfeebled from diarrhea, which the attending physicians seem to have thought necessarily fatal to a person of his great age. The wife of one of the physicians, Mrs. Ball, states in her testimony, that upon a suggestion to that effect by her husband, she said to Mr. Field the day before he was removed: "You are very sick, and if you have anything to settle, you had better do it." To which he replied: "I am aware of my condition. I have twice told you before, I have made my will and all my business is settled. This witness, it appears, visited the testator

several times and assisted in nursing him. She states that he was perfectly prostrated from the time he was taken sick; that he was unable to rise from his bed, and that he was so nervous that he could not hold a glass to his mouth to take water or medicine. The morning he was removed, he could not walk or sit up by himself." In the main, this testimony is sustained by Mrs. Herrick, at whose house he was taken sick. These witnesses both say that Field was removed in a carriage or cab. But this testimony conflicts materially with that of several other witnesses. Ames says that "Field, during the war, was with Mrs. Herrick on Dryades street; he was alone in the house with her; for economy and security it was arranged that she should come and live with us; she removed the furniture first, leaving him there; she came to my house on Saturday; the next morning the negro girl, Caroline, came and said it was a shame that Julia (Mrs. Herrick) had left the old gentleman behind sick. My wife went round to see him. On Sunday evening, I visited him with Dr. Post. We ascended the stairs; the door was locked; we knocked; Mr. Field opened it." In regard to the removal of Mr. Field the next day, the witness says: "He (Dr. Post) went to the house with me to bring Mr. Field round to my house; Mr. Field was between me and Dr. Post, and walked to my house, a distance of seven squares and a half." Caroline Stevens, a witness, says: "I staid with him all the time during his last illness. * * * He was not confined to bed entirely. * * * He was lying down all day Sunday, except when he got up to go out and come back. * * * When Mrs. Herrick went away, he walked up and down stairs by himself. Mr. Field was never so sick in Mrs. Herrick's house that it was necessary to lift him out of bed. I am certain Mr. Field was walked from Mrs. Herrick's house to Mr. Ames'; I am certain of this." In regard to the manner of the removal of Field, the statement of Ames and Caroline Stevens is corroborated by the testimony of Mrs. Leech and Windsor Campbell. Indeed, Mrs. Herrick, in a subsequent part of her testimony, admitted that she knew nothing of the manner in which he was removed; that she knew it only from hearsay. The evidence does not incline us to believe that there was, on the day the will purports to be dated, such a prostration of the bodily powers of Mr. Field as to have rendered it physically impossible for him to write the will or to deposit it where it was found.

In relation to the genuineness of the will, the judgment of experts, persons who were acquainted with the testator, was taken on the trial of the case, in the court below, by a comparison of the signature to the will with genuine signatures of Mr. Field on bank checks introduced in evidence. One of these, a president of a bank, spoke doubtfully on the subject. He "would not have paid checks having the same signature to them as that to the will and envelop. The signature

to the will and the envelop seem to be written by a sick person. I knew Mr. Field to be an old man, and it is possible that, in sickness, his handwriting and signature might have varied much." The treasurer of the Savings Institution found that "some of the checks, numbers one, two and three, compared very well, except in the trembling in the will. The signatures to the checks five and thirteen do not compare well with that to the will, nor do they compare to the check number fourteen. I know the check number fourteen to be Mr. Field's handwriting, for I paid it myself. The body of the check was written by me. If at the time when the signature to the will was written, Mr. Field had been sick, I should say it was signed by the same person who signed check number fourteen." A book-keeper and clerk in one of the banks of New Orleans said: "I was acquainted personally but not intimately with the late Joseph Field; I had occasion every six months to give him a check for his dividend; I was at the time familiar with the signature of Mr. Field; I recognize the signature on the will, marked A, now presented to me, to be his, as far as my judgment goes." The statements of these three witnesses, taken together, we think, are rather in favor of the genuineness of the will than against it. These men, we may suppose, have no interest or feeling in the matter. The testimony of the defendant and that of Jesse Coward and A. K. Aken are in support of the genuineness of the instrument. Liebrook's testimony is equivocal, and entitled to little weight. These are all the witnesses that testified as to the handwrite and signature of the testator.

It is in evidence that the trunk in which the will was found was strictly examined at the decease of the testator, with the view of finding a will, and that it passed into the possession of the defendant and has ever since been kept in his house. In it were found, at the time of the inventory, most of the valuable papers of the decedent. It must be admitted that the history of this will is not free from some degree of romance, and the facts and circumstances connected with it are calculated, not unreasonably, to excite suspicion of its being the veritable act of last will of Joseph Field. But we should bear in mind that examples are not wanting of whims and vagaries displayed by testators, as well in regard to the places chosen to deposit their wills, as to their contents. There is an air of improbability in the account given of so scrupulous a search being made for the much desired act, and that, in the identical trunk that contained it, without success; that it escaped the sight of all so intensely occupied in pursuit of it, and that an accident alone led to its discovery more than two years afterwards. Yet it is clear that such an occurrence is not impossible. The important point in such a case is, to determine, if possible, whether the instrument be genuine or spurious. To this end

we have examined the evidence with much care. We have had, presented for our inspection, the act itself with letters acknowledged to have been written by Joseph Field, and also the checks proved to have been signed by him. We have compared the handwriting and the signatures, and, after full consideration of the whole, we do not feel justified in pronouncing the act a forgery. We think its validity established, and that it should be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; that the defendant be quieted in his ownership and possession of the property acquired by him, as the universal legatee of his late wife, Amanda M. Cowand, and which was denied to her, as the universal legatee of Joseph Field, deceased.

NO. 2170.—MICHAEL AYLAND v. MRS. CATHARINE RICE.

23 75
49 1586

A painter who undertook to have the work of painting a house done, purely as an act of friendship, without any charge on his part, and, when it is completed, furnishes the owner with a memorandum of the cost of materials furnished and labor employed by him, can not afterward, on the mere refusal of the owner to pay the bill, recover more than the amount so charged in the bill. In this case it was held that the refusal by the owner to pay the bill, first made out by the painter, did not create an agreement or obligation to pay additional charges for his own services and supervision of the work which he had undertaken gratuitously.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Field & Shackelford*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWE, J. This case comes before this court for the second time. 20 An. 65. The present appeal is taken from a judgment entered upon a verdict of a jury in favor of plaintiff for the sum of \$800.

The facts seem to be substantially as stated in the brief of plaintiff's counsel, and as follows:

The defendant, desiring to have one of her houses painted, applied to plaintiff, who, "purely as an act of friendship, undertook to have the work done." When it was finished, he handed defendant a memorandum of the money he had paid for material and labor, amounting to \$1039, not as his charge for the work, but simply to show her what the painting had cost him, without including his own services, "for which, at that time, he did not intend to charge." The amount seemed to defendant too large, and a quarrel ensued. The plaintiff then made out a bill for the work, "including in it compensation for his own labor and supervision at the customary prices," amounting to \$1350, upon which the suit was brought. He had received \$550 during the

Ayland v. Mrs. Catharine Rice.

progress of the work, and it was for the balance of \$800 claimed that the verdict was rendered.

It seems to us that the verdict was too large by \$320. The undertaking of plaintiff was purely gratuitous. There was no *aggregation* between the parties, by which a contract to pay him anything for his own services and supervision was established. If, as he alleges, when he presented the first memorandum of \$1030, "the defendant became angry, and insultingly threw the memorandum back in his face," her conduct did not create an agreement to pay \$320 more.

It is not necessary to pass upon the bills of exception reserved by defendant to the refusal of the judge to charge the jury as requested. No testimony was excluded, and the whole case is before us on its merits. *Mahony v. Rugely*, 21 An. 330; *Howell v. St. Charles street Railroad Company*, 22 An. 603.

It is therefore ordered that the judgment appealed from be amended by reducing the amount thereof to four hundred and eighty dollars; that as thus amended it be affirmed, and that plaintiff pay the costs of appeal.

No. 3052.—STATE ex rel. S. M. BURNETT v. H. C. WARMOTH et als.

The act of the General Assembly, approved sixteenth of March, 1870, authorizing the payment of the floating debt of the State by the negotiation of State bonds at a fixed rate or by funding the warrants of the State in bonds at a fixed rate, which created a board of liquidators, with power to sell the bonds, not below a fixed rate, within a given time, did not make it peremptory on said board to sell said bonds at that rate if a higher price could be had, nor did it prohibit the sale of the bonds after the limitation had expired, provided they realized the price fixed in the act.

Therefore the board of liquidators, having left to them a discretion as to whether they would sell the bonds or not and as to the time of sale, can not be compelled by mandamus to exchange bonds authorized to be issued by this act for warrants held by the creditors of the State.

The doctrine heretofore announced by this court is reaffirmed in this case, that a mandamus will never issue to compel a public officer to perform a ministerial act where the law, creating or requiring such duty to be performed by the officer, allows him a discretion either in the manner or the matter of doing it.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Hays & New*, for relator, appellant. *S. Belden*, Attorney General, for defendants.

HOWELL, J. The relator has appealed from a judgment refusing a peremptory mandamus against the board of liquidation, composed of the Governor, the Auditor and the Fiscal Agent of the State.

The only question is the interpretation of the third section of "An Act to provide for the payment or funding of the floating debt of the State by the issue and sale or exchange of State bonds," under which the relator claims the right to exchange a large amount in State warrants for said bonds at the rate fixed in said section.

The first section of the act authorizes and directs the Governor to issue bonds to the amount of three millions of dollars. The second section constitutes the board of liquidation, who are authorized to sell said bonds, in certain named cities, at not less than seventy-two dollars on the one hundred, the proceeds to be paid into the State treasury to the credit of this fund and to be employed, under the direction of the board of liquidation, exclusively for the payment and redemption of the floating debt of the State, past due interest coupons and past due State bonds, due and adjusted prior to first April, 1870. The third section reads :

“That, if at the expiration of the thirty days from and after the passage of this act, the said board of liquidation shall not have sold the said bonds in accordance with the provisions of the second section of this act, then and in that case, they are hereby authorized and empowered to exchange the aforesaid bonds at the rate of one hundred dollars in bonds for each and every seventy-two dollars of all outstanding evidences of indebtedness against the State of Louisiana, which may have been issued in accordance with law prior to the passage of this act,” (sixteenth March, 1870).

At the expiration of the thirty days one-third of the bonds were unsold.

The question presented is, was it the intention of the Legislature, which is the test, to confer any discretion or impose a positive and absolute duty in regard to the exchange of the bonds ?

If it is clear that the board has no discretion, but must, after the lapse of thirty days, exchange the bonds, whatever may be their value, for the specified evidences of debt, the writ prayed for should be granted; but if there is any reasonable doubt, it should not. See State ex rel. Bonnabel v. Police Jury of Jefferson, decided December 12, 1870.

The duty of the Legislature was to provide for the prompt *payment* of the floating debt, and its primary object, in adopting this statute, was to meet this duty and procure the money to pay with, and in fixing a minimum limit upon the sale of the bonds it limited the discretion of the board in that direction, but not their duty as faithful agents, to procure the best price possible, the public credit and public honor being involved. But it also provided, that in case this minimum price should not be obtained within a certain time, the agents should be empowered to exchange the bonds with the creditors at said minimum price or rate. The words used are “authorized and empowered.” There are no terms used, however, which restrict the sale of the bonds to thirty days, and it is not a strained construction to say that, after the lapse of that time, the board, as faithful agents, might either sell or exchange, as the public good required.

Suppose, at the time indicated, none of the bonds, from any cause whatever, had been sold, does the statute mean that the creditors, holding the specified evidences of debt, could obtain nothing for them, except those bonds at the rate mentioned, and the board of liquidation would be compelled to exchange them, although they might, at that particular date, begin to advance and come into demand at a much higher rate? Was it the intention of the Legislature to give to the creditor the opportunity of speculating upon the public securities or to provide the means of paying and liquidating just debts?

These inquiries, we think, are calculated to raise a reasonable doubt as to discretion or no discretion in the board of liquidation, and while we consider it their duty to discharge the functions of their trust with fidelity and promptitude, yet the case presented does not authorize or compel the writ of mandamus as demanded.

Judgment affirmed.

23	78
47	475
47	484

23	78
52	1829

No. 3047.—STATE v. VINCENT BAYONNE *alias* SARAGODAS and PEDRO ABRIEL.

In an indictment for murder the accused is charged with killing and murdering one Ambrosio whose first name is unknown. The jury found a verdict of guilty, and the accused pleaded in arrest of judgment, that the indictment was void for uncertainty, in not giving the first name of the deceased; that the description by name of the person killed is repugnant, because Ambrosio in French or Spanish, in Latin Ambrosius, in English Ambrose, are first names. Held—That a description of the deceased by the first or second name is sufficient, if the fact be stated that the other name is not known; that the indictment is not void because the first name of the person killed is not given.

A bill of exceptions was also taken to the ruling of the judge *a quo*, in reference to the testimony of an accomplice, as follows: The judge charged the jury that the witness, charged as an accomplice, was as any other witness, but that his credibility was entirely with the jury; that, if they believed his testimony, it was competent for them to find a verdict on his testimony alone; but he advised them not to do so unless this testimony was corroborated; that they were judges of both law and fact.

Held—That this charge, taken as a whole, was not erroneous; that the State has the undoubted right to make use of the testimony of an accomplice, and he is a competent witness, yet the credibility of his testimony may be subject to suspicion, which the jury, under this charge, were not prohibited from considering.

APPEAL from the First District Court, parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State. *E. K. Washington* and *D. M. C. Hughes*, for defendants and appellants.

Howe, J. The defendants in this case were found guilty of murder, and sentenced to suffer the punishment of death, and have appealed.

Two points are made before us, the first raised upon a motion in arrest of judgment, the second upon a bill of exceptions.

First—It is urged that the indictment charging the prisoners with the murder of “Ambrosio, whose first name is unknown,” is void for “uncertainty and duplicity,” in that there is not a sufficiently legal

State v. Bayonne, alias Saragodaa, and Abriel.

designation of the person alleged to have been killed. It is claimed by counsel that the description of the person killed is "repugnant, because Ambrosio in French or Spanish, in Latin Ambrosius, in English Ambrose, are as palpably first names as George or John;" and they ask the question in their brief, "would an indictment stand describing a person alleged to have been murdered, merely as one George whose first name is unknown?" We presume, from the nature of the case, that the question is seriously asked, and we think it must be answered in the affirmative. We are not aware of any rule of law or philology which necessitates a negative reply. We lately decided the case of Elias George v. A. G. Tucker. In the Twenty-first Annual there are two cases in which the last name of each plaintiff is James. In the late war two prominent characters were Governor Andrew and General Thomas. In these, and a multitude of other examples which might be cited, what are often used as Christian names are used as surnames. We do not think, therefore, that the phrase quoted from the indictment, "Ambrosio, whose first name is unknown," is in itself inconsistent and self-destructive. Nor do we think the description totally insufficient. It is admitted by appellants' counsel, on the authority of Mr. Archbold, that while the name of the deceased person should be stated, if it be known, yet, "if not known, he may be described as a certain person to the jurors unknown." *A fortiori*, it would seem plain that where one of the names of the person deceased is known, and the other is not, it will be sufficient to mention the name that is known and the fact that the other is unknown.

Second—The bill of exceptions relied on was reserved to the charge of the judge in reference to the testimony of an accomplice. The charge, as stated by the judge, was, "that the witness charged as an accomplice was as any witness, but that his credibility was entirely with the jury; that if they believed the witness, it was competent for them to find a verdict on his testimony, but they were advised not to do so unless his testimony was corroborated; but if they found the evidence given by the accomplice corroborated, it was to be dealt with as other evidence, and that they were judges of both law and fact."

We do not perceive any error in this charge, taken as a whole. It is frequently necessary for the State to make use of the testimony of an accomplice; and that such a witness is competent, can admit of no doubt. His credibility may be justly subject to suspicion, and of this question of credence the jury must judge under the time honored instruction that, while they may find a verdict of guilty upon this testimony without corroboration, yet they are advised not to do so.

Judgment affirmed

No. 2148.—WILLIAM P. McLAREN & Co. v. J. B. M. KEHLER.

Each State of the American Union must give the same effect, within its limits, to the judicial decrees of every other State, which such decrees have in the State where they are rendered. Constitution of the United States, Art 4, Sec. 1.

Therefore a judgment, final and conclusive in the State in which it was rendered, is final and conclusive in this State, and a judgment without effect in the State in which it was rendered, is without effect here.

The courts of the State in which a judgment of a court of another State is sought to be enforced, have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. And in determining this question the courts of this State will require that the whole record of the proceedings be produced under which the judgment was obtained, in order to show how far it may be conclusive.

If a judgment of the inferior jurisdiction of another State has been appealed, and the Supreme Court has pronounced a final judgment thereon, and the judgment or demand passed upon is sought to be enforced in this State, the record or proceedings of the Supreme Court, being the final judgment in the cause, is the proper transcript to present to enable the courts of this State to ascertain how far it is conclusive in the State where it was rendered.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. R. H. Marr*, for plaintiff and appellee. *E. Wooldridge*, for defendant and appellant.

TALIAFERRO, J. This is a suit to enforce a judgment rendered by the Circuit Court of the Second Judicial Circuit of the State of Wisconsin, sitting for the county of Milwaukee. By that judgment the defendant was condemned to pay the plaintiff the sum of \$1445 59 and costs. The defense is, that at the time of the institution of the suit and the issuing of the summons therein, in the county of Milwaukee, State of Wisconsin, the defendant was not a resident of the State of Wisconsin, but was then, and had been long before a resident of the State of Louisiana, where he has constantly resided ever since, having established his domicile in the last named State prior to the issuing of the summons and the institution of the said suit. The defendant avers that no summons in that case was ever served upon him; that no appearance in his behalf was made by himself or by any person authorized by him. He denies any indebtedness whatever to the plaintiff, and prays judgment in his favor. The court below rendered judgment in favor of the plaintiff, and the defendant has appealed.

The facts, as we find them in the record, seem to be, that suit was brought against the defendant in Milwaukee county, in the State of Wisconsin, and that the citation was served at the residence of defendant's father-in-law, in Racine county, by delivering a copy of the citation to the defendant's wife; this service was made on the fourteenth of August, 1865. This citation, it seems, was sent to Jenkins, who had long been the attorney at law of the defendant during his residence in Wisconsin. Jenkins was served with a copy of the petition on the twenty-second of September following, and on the eleventh of October obtained an extension of twenty days to

answer. During this delay the attorney drew up an answer and mailed it to defendant at New Orleans. Jenkins states that he was informed by defendant that he never received the answer to be verified; in consequence judgment was rendered against the defendant on the sixteenth of February, 1866. The suit to enforce the judgment in Louisiana was filed on the twenty-second of November, 1866, and judgment rendered on it on the fifteenth of February, 1869. Pending this suit in Louisiana, the defendant commenced an action in Wisconsin, for the purpose of opening the judgment there, in order to enable him to answer and set up the plea of change of domicile and want of citation. This proceeding was commenced in Milwaukee in February, 1867. Jenkins, the defendant's attorney, upon his own affidavit of his ignorance of the defendant's removal from Wisconsin and that his having appeared for defendant was predicated upon the belief that defendant was only temporarily absent and upon the defendant's affidavit, obtained an order for opening the judgment to enable the defendant to answer. From this order of the Circuit Court the plaintiff appealed to the Supreme Court of Wisconsin, and obtained a reversal of the order. The final decree of that court, reversing the order of the Circuit Court, was returned and filed in the Circuit Court on the seventeenth of January, 1868.

A duly certified copy of this decree was introduced in evidence on the trial of the case in the court below. Its introduction was objected to by the defendant on the ground that the filing of the record of the Supreme Court of Wisconsin, was a change in the nature of the demand. The evidence was properly admitted. The ground taken by the defendant was, that the judgment sued on was not conclusive upon the defendant; evidence, therefore, to show that it was conclusive was fairly admissible.

The first section of the fourth article of the Constitution of the United States directs that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." A compliance with this provision of the supreme law requires that each State shall give the same effect within its own limits to the judicial decrees of every other State, which such decrees have in the States where they are rendered. Then it follows that a judgment, final and conclusive in one State, must be so in every other State. A judgment without effect in the State where it is rendered, is without effect in any other State. The courts of the State in which it is sought to enforce a judgment rendered in another State, have the right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. This doctrine has often been announced by this court. In the case of *Hockaday v. Skeggs*, 18 An. p. 682, the rule was repeated in

these words: "It has been settled by frequent decisions of this court, that in order to enable the courts of this State to give effect here to a judgment rendered in another State the whole record of the proceedings under which the judgment was obtained, must be produced in order to show how far it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes. It must also show that the defendant had due notice, or that he actually appeared."

The defendant aims to show that he had changed his domicile from Wisconsin to Louisiana at a time anterior to the institution of the suit against him in Wisconsin, and that he had no notice of the proceedings.

The testimony of several witnesses was taken under commission and introduced upon the trial. It is to some extent contradictory as to the last place of residence of the defendant in Wisconsin.

But a question of grave import here arises. We have seen that within two months from the date of the filing of the suit in Louisiana to enforce the Wisconsin judgment the defendant repaired to that State and set up the same defense there against the judgment which he used here. His own affidavit and that of his attorney were introduced to sustain his pleas of want of domicile and want of citation. The Circuit Court did not vacate the judgment, but rendered this order: "It is ordered that the defendant have leave to file his answer on payment of ten dollars costs, and the judgment now entered remain and abide the event." The appeal was taken from the whole order and it was reversed by the Appellate Court in January, 1868, more than one year before the rendition of the judgment against the defendant in the Louisiana court. It appears then that the grounds upon which the defendant depended in the Circuit Court of Wisconsin to set aside the judgment, were reversed by the Supreme Court of that State; the affidavits, we have referred to, were examined and passed upon by that court, and it decided that the defendant had received notice in the original proceeding, and was of opinion that he showed no case of surprise, mistake or excusable neglect, and nothing which could appeal to the discretion of the court below. It held that "it was an abuse of discretion to let him in to answer."

If this judgment is conclusive against the defendant in Wisconsin, it is equally conclusive in Louisiana. The courts of this State are estopped from all inquiry into its correctness, and are precluded from considering the issues raised by the defendant, and which, by the judgment of the Supreme Court of Wisconsin, have become *res judicata*. We think the position of the defendant's counsel in regard to the admission in evidence of the transcript of the decree of the Supreme Court of Wisconsin not well taken. The judgment of the

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Circuit Court, made final on appeal, was merged in that of the appellate tribunal. There was at the time of the trial of this case in the Fifth District Court but the one judgment for the defendant to combat, and he had to oppose it in the character and force it had assumed by his own proceedings. We are of the opinion that the judgment of the lower court should be sustained.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Rehearing refused.

No. 2245.—GEORGE STEWART v. JANE C. BOYLE, wife of J. A. ROBINSON.

The husband who joins with and authorizes the wife to execute a mortgage on her paraphernal property for the purpose of improving it, can not afterward, when the mortgage is sought to be enforced, set up by way of defense, that the property mortgaged was community property, and the wife was without the power or authority to encumber it. Having signed the mortgage himself, he can not be permitted to deny or gainsay his own solemn act.

In a suit by executory process to foreclose a mortgage executed by the wife, on her separate property with the authorization of her husband, the authorization of the wife by the husband to defend the proceedings is not necessary.

A PPEAL from the District Court, parish of Jefferson. *Pardee, J. B. C. Elliott*, for plaintiff and appellee. *R. King Cutler*, for defendants and appellants.

HOWELL, J. On the twelfth of March, 1867, Mrs. Robinson, specially authorized and assisted by her husband, presented a petition to the judge of the district court for the parish of Jefferson, alleging that she had contracted with the plaintiff, George Stewart, to erect a residence on two certain lots in Carrollton, her separate property, and obtained an order authorizing her to grant a mortgage on her said paraphernal property to secure the payment of the sum of \$2,200, amount of the said improvements, according to the act of 1855 on this subject. In pursuance whereof and duly aided and authorized by her said husband, she appeared with him before a notary public and executed a mortgage on her said property to secure the payment of two notes, one for \$1,276 90 and the other for \$900, representing the amount she owed the plaintiff, who obtained an order of seizure and sale on the note for \$1,276 90, and caused notice to be served on Mrs. Robinson; whereupon the husband and wife, jointly and individually, as alleged by them, enjoined the sale on many grounds, only two of which are urged before us, to wit: That the property mortgaged by the wife was acquired during marriage and belonged to the community, there being no separation of property between the spouses, and hence the wife was without legal authority to encumber it, and that the wife was not authorized by her husband or the judge to defend the executory proceedings.

23	83
49	1006

23	83
52	906

Stewart v. Jane C. Boyle, wife of Robinson.

First—As the husband authorized and aided his wife to represent and mortgage the property in question, as her separate paraphernal property, he is concluded from denying it as to the parties to the act of mortgage, which is signed by him. This is an action not to protect the wife's property, but that of the community which the husband authorized the wife to treat as her property and encumber it with a debt in order to improve it, and he can not deny his own solemn act.

Second—There was no necessity for any authorization from the judge to defend the executory process. He had already given her authority to bind herself and execute an act importing a confession of judgment as a former sale, and all that was required was the notice which was served. There is no force in the other grounds for an injunction.

Judgment affirmed.

No. 2281.—ADELE GERNON et als. v. DAVID C. McCAN.

One who alleges extinguishment of his debt by payment, must prove it.

Payment of a debt which is to be acquitted in money, may be made by a third person not interested, C. C. 2160; Dig. 46, 3, 53; but this payment must be the deliberate and intentional act of this third person, for payment is not merely the delivery of a sum of money, but the performance of an obligation; an act calling for the exercise of the will—of consent; without which it has not the characteristics of that mode of extinguishing obligations.

When, therefore, it appears as matter of fact, that a third person acted as agent, both for the makers of notes who desired an extension, and for a party who wished to purchase them as an investment, and consented to the extension; and this agent paid the money, believing that he was purchasing the notes, and the extension was accordingly made: Held—That the transaction would not be considered a payment, merely because the person who received the money imagined that he received it in payment.

A PPEAL from the Second District Court, parish of Orleans. *Thomas, J. Semmes & Mott* and *Hays & New*, for plaintiffs and appellants. *R. H. Marr*, for defendant and appellee.

Howe, J. This suit was instituted by heirs of William Mish and Oliver Dubois to annul a judgment obtained against the executors of Dubois and the administratrix *pro tempore* of Mish by the defendant, McCAN, on certain mortgage notes. It was contended by the plaintiffs that the notes had been paid and extinguished long before McCAN brought his suit. This payment was denied by the defendant, who averred himself to be the owner and holder of the notes in good faith, for value, and before maturity.

There was judgment for defendant, dismissing the suit, and dissolving the injunction which the plaintiffs had obtained, with \$2800 damages, and the plaintiffs have appealed.

The main question for our decision is, whether or not the notes in question were paid, and thus extinguished, as alleged by plaintiffs. There is no question of the validity of these obligations originally. They were given for borrowed money in 1859, and were secured by

mortgage on valuable property on St. Charles street. They amounted in the aggregate to \$28,000 and were to fall due March 18, 1862. It seems that about a month before their maturity, McClellan, the executor of Dubois, one of the makers, and the agent of Mish, the other maker, finding that the notes could not be met when due, sent the witness Yenni to Mr. Kruttschnitt, the agent of William Vogel, the owner of the notes, to negotiate for an extension. The agent agreed to extend, "at current rates," which seem to have been ten per cent. per annum. McClellan sought to do better than this, and opened negotiations with Moore, a broker, who represented a party named Stone, who had money to invest and was willing to give time for payment at five per cent. per annum. In his testimony Moore says:

Dubois and Mish wanted me to have the notes extended; they could not pay them at maturity; I went to the holders of the notes several times to find out about the rate at which they would be willing to extend them; I told the agent of Dubois and Mish that it would be eight per cent. for the extension, and they told me to see if I could not do any better. * * I made arrangements at five per cent. (for) two years; I acted as broker for McClellan; he had a power of attorney to act for them, (the makers), and before the notes were extended he had to bring his power to the notary.

I went to the holders of the notes and told them I had made better terms for Dubois and Mish, and would take the notes up in a few days, which I did, and had them extended before W. L. Poole, notary.

Question. Where did the money come from to take up the notes; whose money was it?

Answer. It was money of William Stone.

Q. That was the money you gave to Mr. Kruttschnitt?

A. Before the notes were negotiated the trade was made with Stone in the first place, but as he was going to leave, he made the arrangement with Major Hardy.

Q. But in the matter you acted as broker or intermediary of the parties?

A. Yes, sir.

Q. How was the payment made; how did you get possession of the notes?

A. I went to Mr. Kruttschnitt's office and tendered the money. He told me he wished I would go to the bank and have it deposited, as he was not a very good judge of money. He asked me to go with his young man, and then he would know it was all right, if it was put to his credit in the bank.

Q. And you did go and deposit the money to his credit?

A. Yes, sir.

Q. And then he gave you the notes?

A. Yes, sir.

Q. And you gave the notes to Mr. Stone?

A. I gave the notes to the party who made the negotiation in the meantime, to Major Henry.

Q. And this renewal was in pursuance of the original agreement under which you took up these notes?

A. Yes, sir, I had possession of the notes all the time until they were extended.

The witness further says of the notes:

I bought them before the maturity. They were extended by this act before Poole, and then there was this renewal of the eighteenth March, 1864, for two years.

He then testifies to the further extension of the notes to March 18, 1867, by the defendant, McCan, who had bought them from witness's firm for about their face value in lawful money.

The two notarial extensions are in evidence, and memoranda thereof are indorsed on the notes. The last extension is indorsed by a memorandum in the handwriting of a partner of Moore.

We do not understand that there is any dispute respecting the facts thus far stated, or any doubt of the truthfulness of the witness whose testimony we have quoted.

On the part of plaintiffs, Kruttschnitt, the agent of Vogel, who was holder of the notes in the early part of March, 1862, testified.

Q. Were these notes ever paid to you, if so, when and where?

A. I got the money on the eleventh of March, (1862), I believe, from Mr. Moore; it was Confederate money. The notes were deposited in the Citizens' Bank.

Q. Had there been any effort made to pay these notes while in the Citizens' Bank?

A. I should think so from the fact that the person—I believe Mr. Moore or some one else—came to me and said he must withdraw the notes from the bank because the bank could not receive Confederate money without a written authorization.

Q. When the money was paid to you, did you make a sale of the notes to the person who paid the money; did you make a transfer of your rights to him, or did you deliver up the notes as to a person who was paying them?

A. I delivered them as to a person who was paying them.

Q. You never sold the notes at all for Confederate money?

A. Certainly not.

Q. Did you want to receive payment in Confederate money?

A. I took legal advice about receiving Confederate money, and the opinion was, I could not be forced to receive it, and that if I instituted a law suit, I might recover in gold and silver. He (the lawyer) said:

"That is my advice as a lawyer; now I will give you my advice as a friend"—and that advice was to take Confederate money, because at that time it was very dangerous to refuse to take Confederate money. One of my personal friends was very nearly lynched for refusing to receive it. About a month or so before this I was applied to to renew those notes. There was no rate stipulated, but I told them I would renew the notes at the rates ranging in the market at the date of maturity. I gave my consent to renew the notes, but no rate was agreed on."

It is not necessary to consider the effect of the use of Confederate money in this case, since the original consideration of the notes was lawful and valuable. 21 An. 513. The main point relied upon by plaintiffs is that the notes were paid in March, 1862, and thus extinguished, and that they are entitled to the benefit of this fact, although neither they nor their ancestors nor their ancestors' representatives have ever paid a farthing, and, despite the fact that the executors, agent and administratrix we have named, never made any such plea, but permitted the judgment sought to be annulled to be recovered without defense.

It is true that the payment of a debt which is to be acquitted in money, is permitted to be made by a third person, even one not interested. The right thus to pay is absolute; it may be exercised not only against the will of the creditor, but without the knowledge and even against the opposition of the debtor; because on the one hand the creditor has no interest and consequently no right to refuse a regular and satisfactory payment, and it is a matter of indifference whence the money comes, and because, on the other hand, it is permitted to every one, by a kind of "fraternal mandate," to ameliorate the condition of another, even without his knowledge and against his will. Larombiere on Obligations, vol. 3, p. 66. Thus Gaius decided: "*Solvere pro ignorante et invito cuique licet, cum sit jure civili constitutum licere etiam ignorantis invitique meliorem conditionem facere*," Dig. 46, 3, 53; and this rule of the Roman law has been continued in article 1236 of the Code Napoleon and in the corresponding article 2130 of the Code of Louisiana.

But it seems equally clear that the payment thus permitted must be the deliberate and intentional act of the third person who makes it; that this provision of law is not meant to entrap the unwary; and that one who, like Stone or Henry, sends his broker to buy negotiable paper, shall not find that paper turning to ashes in his grasp, as by a sort of legal sorcery, simply because the person to whom he gives his money erroneously imagines that the transaction is a payment, and not a purchase. In the case of *Bloodworth v. Jacobs*, 2 An. 26, this court said in regard to payment: "It is not only the delivery of a sum of

money, but the performance of an obligation. It is an act calling for the exercise of the will, of consent, without which it has not the characteristics of that mode of extinguishing obligations;" and we are satisfied that there was no such consent in the case at bar. We might even doubt if Kruttschnitt was justified in forming the opinion of the nature of the transaction, which he expressed in his testimony. He knew the makers required indulgence and extension. He knew that Moore was a broker negotiating for an extension, and that he had made better terms with other parties than he (Kruttschnitt) would grant. He had no reason to imagine that Moore delivered him the money "in the name and for the discharge of the debtors;" but he was aware that the money came before the maturity of the notes. Should it not have seemed strange to him that debtors who were praying and paying for an indulgence should be discharging the debt before maturity? Nor could he have easily imagined that at such a time Moore was a third person, acting in his own name, and volunteering to pay so large a debt from charitable motives, by a "fraternal mandate," extinguishing the obligation, releasing the mortgage, and trusting for his reward, at most, to the doubtful security of an action *ex æquo et bono*. It is not unfair to remark that this opinion of Kruttschnitt had but a small foundation.

The notes in question were given for a consideration of the highest character. The makers were unable to pay them at maturity and sought to obtain an extension, at first from the holder, but ultimately and more advantageously, by an equally common method, a purchase by some one who had money to invest in such securities and was therefore not only willing but anxious to give further indulgence. The extension was made accordingly.

We must conclude that the plaintiffs, on whom the *onus* rests, C. C. 2429, have not established payment and extinguishment with reasonable certainty. 16 An. p. 368; 18 An. 245.

It might be urged that if there was no payment for want of consent, neither was there any purchase and transfer for the same reason. But we apprehend that the plaintiffs can not be heard to say this. The notes, originally valid and still unpaid, are indorsed in blank and pass from hand to hand. Vogel does not claim them, and the plaintiffs do not contend that the possession and enforcement by McCan deprived them of any defense they might have had against any previous holder.

The amount of damages allowed was clearly proved. The defendant in answering the appeal has asked that they be increased, but we are not prepared to say that they should be. The plaintiffs urge that they ought not to have been allowed at all against the sureties, on the ground that the act of 1855, providing for a judgment for damages and fees against the sureties of a plaintiff who enjoins the execution of a

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judgment, applies only where the judgment has been enjoined on an allegation of compensation, set-off or payment, since the rendition of the judgment. Acts of 1855, p. 324. A different rule, however, seems to have been settled by repeated decisions of this court. 13 L. 380; 2 An. 822, 874; 4 An. 183; 10 An. 419; 11 An. 91, 280, 697; 12 An. 181, 587; 14 An. 737; 15 An. 52.

Judgment affirmed.

Rehearing refused.

LUDELING, C. J., *Dissenting*. I regret the necessity which forces me to dissent from the views of the court in this case. And as the point of difference between us is as to whether or not there was a payment of the notes which are the subject of this litigation, I propose to recapitulate all the evidence on that point.

Mr. John Kruttschnitt, a witness for the plaintiff, having stated that he held the notes in question as the agent of Mr. Vogel, answered as follows:

Question. Were these notes ever paid to you, and if so, when and where?

Answer. I got the money on the eleventh of March.

Q. From whom?

A. I believe from Mr. Moore.

Q. What sort of money was it?

A. It was Confederate money.

Q. That is, Confederate treasury notes, called Confederate money?

A. Yes, sir.

Q. Was there any effort made to pay these notes before; where were they?

A. The notes were deposited in the Citizens' Bank?

Q. Had there been any effort made to pay these notes while in the Citizens' Bank?

A. I should think so from the fact that the person, I believe Mr. Moore, or some one else, came to me and said he must withdraw the notes from the bank, because the bank could not receive Confederate money without a written authorization.

Q. When the money was paid to you, did you make a sale of the notes to the person who paid the money; did you make a transfer of your rights to him, or did you deliver up the notes as to a person who was paying them?

A. I delivered them as to a person who was paying them.

Q. You never sold the notes at all for Confederate money?

A. Certainly not.

Q. Did you want to receive payment in Confederate money?

A. I took legal advice about receiving Confederate money, and the

opinion was, I could not be forced to receive it, and that if I instituted a suit, I might recover in gold and silver. He said, "that is my advice as a lawyer; now I will give you my advice as a friend," and that advice was to take Confederate money, because at that time it was very dangerous to refuse to take Confederate money. One of my personal friends was very nearly lynched for refusing to receive it.

Q. When was this payment of Confederate money made to you?

A. On the eleventh March, 1862.

Q. Had you been applied to to renew those notes?

A. About a month or so before this I was applied to to renew those notes; there was no rate stipulated, but I told him I would renew the notes at the rates ranging in the market at the date of maturity. I gave my consent to renew the notes, but no rate was agreed upon.

Cross-examined—Q. When Mr. Moore called to see you about paying you the money, where were the notes?

A. At the Citizens' Bank for collection.

Q. Were they in a box at the Citizens' Bank?

A. No, sir, they were for collection.

Q. Did not Mr. Moore, after going to the bank, come back and tell you that they could not get the notes, that they were in a box, and did you not send to the bank and get them out?

A. Whether Mr. Moore was at the bank or not, I don't know, but when the gentleman came to my office, requesting me to take the notes out of the bank, because the bank would not receive Confederate money without an authorization to do so, then I sent to the bank and took them out.

Q. Was the money paid you for these notes handed to you personally or deposited at the bank?

A. It was handed to me personally at my office.

Q. What did you do with the money?

A. Deposited it in bank.

Q. Did you carry it personally to the bank and deposit it?

A. No, sir; one of my clerks did.

Q. Then Mr. Moore gave you the money at your office, and you gave Mr. Moore the notes at your office, and one of your clerks took the money and put it in the Citizens' Bank; that is the history of the transaction?

A. Yes, Sir.

Q. You are certain you are not mistaken as to what occurred in that respect?

A. I think not.

Being shown the bank book of Mr. Vogel with the Citizens' Bank, witness states that on the eleventh March, 1862, there appears an entry in the book of a deposit of cash of \$28,000.

Q. Did you check out that money?

A. Yes, sir; not this very same day, however.

Q. But you checked it out and used it?

A. Yes, sir.

Q. Are you aware of the fact that Mr. Moore was at that time and had been, for some time previously, a broker in the city of New Orleans?

A. I believe I recollect he was a broker, although I believe he was not doing a general broker's business.

Q. Well, you knew him as a broker, didn't you?

A. I believe I did know him as a broker, but perhaps it is only that I know him as a broker now that makes me believe he was a broker then?

Robert Moore sworn and examined for the defendant answered as follows:

Q. Do you know anything about the four notes in controversy?

A. Yes, sir.

Q. What connection had you with these notes at any time, or what was the first connection you had with these notes?

A. Dubois and Mish wanted me to have the notes extended; they could not pay them at maturity.

Q. What did you do in the matter?

A. I went to the holders of the notes several times to find out about the rate at which they would be willing to extend them. I told the agents of Dubois and Mish that it would be eight per cent. for the extension, and they told me to see if I could not do any better.

Q. Which of the agents of Dubois and Mish did you deal with in that matter?

A. John J. C. McLellan.

Q. What subsequent arrangement did you make?

A. I made an arrangement at five per cent.

Q. For what length of time?

A. Two years.

Q. In what capacity did you act in that matter?

A. I acted as broker for John McLellan.

Q. Do you know whether McLellan professed at that time to be the representative of Dubois and Mish, and, if so, in what capacity was he their representative?

A. He had a power of attorney to act for them, and before the notes were extended he had to bring his power to the notary.

Q. What did you do afterwards?

A. I went to the holders of the notes and told them I had made better terms for Dubois and Mish, and would take up the notes in a few days before they matured, which I did, and had them extended before W. L. Poole, notary.

Q. Is this document, marked B. C., a copy of the act by which the notes were extended?

A. It is, sir.

Q. Where did the money come from to take up these notes; whose money was it?

A. It was money of William Stone.

Q. Was that the money you gave to Mr. Kruttschnitt?

A. Before the notes were negotiated the trade was made with Stone in the first place, but as he was going to leave he made the arrangement with Major Henry.

Q. But in the matter you acted as broker or intermediary for the parties?

A. Yes, sir.

Q. How was the payment made; how did you get possession of the notes?

A. I went to Mr. Kruttschnitt's office and tendered the money; he told me he wished I would go to the bank and have it deposited, as he was not a very good judge of money; he asked me to go with his young man and then he would know it was all right, if it was put to his credit in the bank.

Q. And did you go and deposit the money to his credit?

A. Yes, sir.

Q. And then he gave you the note?

A. Yes, sir.

Q. And you gave the note to Mr. Stone?

A. I gave the note to the party who made the negotiation in the meantime, to Major Henry.

Q. And this renewal was in pursuance of the original agreement under which you took up these notes?

A. Yes, sir; I had possession of the notes all the time, until they were extended.

Q. Was there any subsequent renewal of these notes?

A. Yes, sir.

Q. What subsequent renewal was there?

A. I bought them before their maturity; they were extended by this act before Poole, and then there was this renewal of the eighteenth March, 1864, for two years.

Q. Where were these renewals made across the face of the notes?

A. They were made at the notary's.

Q. When were they made; at the time they bear date?

A. Yes, sir.

Q. How came Mr. McCan to become possessed of these notes?

A. I sold them to him; he paid me in United States treasury notes. * * * I paid gold for the notes to Major Henry. * * *

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Cross-examined—Q. Who is William Stone ?

A. He is a person who was with Mr. Tilton at the time.

Q. Where is he now ?

A. At the North—at least, I believe he is dead ; he has been dead four months.

Q. Who is Major Henry ?

A. He has a shoe house on Common street.

Q. What is the name of the firm ?

A. John Henry & Co.

Q. When did Stone part with the notes ?

A. He parted with the notes the very same time, made the profit on the notes at once, because Stone was not a man of any means.

Q. Were you interested in that yourself ? Didn't you advance the Confederate money ?

A. No, sir, I did not ?

Q. So the notes went into the hands of Major Henry the moment you got possession of them ?

A. Yes, sir. * * * * * * *

Q. Was not Confederate money exceedingly abundant here in March and April, 1862

A. It was.

Q. Everybody was seeking to get rid of it by way of investment ?

A. Yes, sir, and other currency ; it was all on a par ; we did not believe in currency much.

Q. These Confederate notes, did you have them at the office of Kruttschnitt when you tendered them ?

A. Yes, sir.

Q. You say you went to deposit the notes in the bank ?

A. He would not take them ; he said he wanted them credited to him in the bank and then he knew they were all right. * * *

Q. How comes it that, if these notes were the property of Major Henry, the moment the transaction was closed, we find, on the twenty-first March, 1862, a notarial act by which the extension appears to be made between Stone (who seems to be a man of straw) and McClellan, agent of Dubois & Mish ? Why didn't Henry intervene in that act ?

A. Stone made his profit on the notes.

Q. That is true, but why was it that on the twenty-first of March, 1862, the extension appears to be in the name of Stone, and not in the name of Henry ?

A. It doesn't make any difference about the extension ; the transaction was about three weeks in making ; Henry wanted an investment and I said to him : "There is an investment about to be completed that you can place your money in."

Q. When you went to Kruttschnitt, did you tell him you came to buy the notes from him ?

A. He knew I went there to have them extended and said the rate was eight per cent. ; I went there twice to see him.

Q. At the instance of McClellan ?

A. Yes, sir. * * * * * *

I can not resist the conviction that Moore, the agent of McClellan, the agent of the makers of the notes, first went to Kruttschnitt to make terms about extending the notes, and that, subsequently, he went to him as one authorized to take up the notes for the makers and "tendered payment" thereof; that Kruttschnitt, under a dread of public opinion and of the consequence of outraging it by refusing to receive Confederate money in payment of a debt, received the money tendered as a payment and gave up the notes.

I do not deem it necessary to refer particularly to the contradictions, equivocations and evasions in the testimony of the witness, Moore; they are palpable. But even his testimony shows that the notes were "taken up" by him as the agent of McClellan. He says he went to Kruttschnitt's office to see him about making terms for McClellan for the extension of the terms of payment of the notes; that Kruttschnitt consented to extend the time; that he returned, after some delay, to the holder of the notes and told him he had made better terms for Dubois & Mish and would take up the notes in a short time, and shortly afterwards he again went to Kruttschnitt's office and "tendered the money" and received the notes. But if there were any conflict between the testimony of this witness and that of Kruttschnitt, I think the latter witness's testimony entitled to greater weight, for his liability is the same, whether the money were received in extinguishment of the obligation or as the price of a transfer, and his answers are direct, apparently truthful, more consistent with the conduct of rational business men and consequently more probably true.

It is certain Kruttschnitt did not sell the notes or transfer his rights to Moore or any one else; he thought he was delivering up the notes as extinguished by the payment made by Moore. He certainly never dreamed of a sale for Confederate money at a time when that currency was abundant and everybody desired to get rid of it, for it was just before the capture of the city by the Federal forces. It is clear if Moore made the payment for McClellan, the agent of Dubois & Mish, the obligation was extinguished, with all its accessories. C. C. 2130; 5 R. 204; 7 N. S. 602; 11 R. 346; 10 An. 732; 11 An. 708; 13 An. 56.

If he paid it in his own name or in the name of Stone or Henry, is the consequence materially different, so far as the notes are concerned?

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Article 2130 of the Civil Code declares that "the obligation may be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that, if he acts in his own name, he be not subrogated to the rights of the creditor." There was no subrogation at the time of payment. An agreement to subrogate before payment or an actual subrogation after payment will not suffice. 11 An. 294, *Willson v. Gardiner*; 15 An. 400, *Sewall v. Howard*; C. C. 2156, 2157. The case of *Holland v. Pierce* resembles this case in many respects. That was a case by an indorsee against an indorser of a promissory note. It was drawn by John F. Miller and made payable to the defendant; he indorsed it to the plaintiff, by whom it was transferred to the house of Hyde & Leeds, and by them it was discounted at the office of discount and deposit of the United States Bank.

"The day it became due, at the hour the bank was closing, the plaintiff called and, giving the teller the amount of the note, received it from him. In the evening he handed it over to a notary public, who demanded payment from the maker, which was refused, and the note was accordingly protested. The explanation of this transaction, which the respective parties have made, differs very widely. * * * Which of these statements be true, it concerns not the court to inquire, as the legal rights of the parties must be settled on other considerations. * * * The inquiry by which this question is to be decided needs only be directed to one single fact—was the note *paid* or was it *purchased*? If the latter, the holder had the same right as the person from whom he received it, and could, of course, on default of the maker to pay, have it dishonored. If the former, there could be no protest for non-payment, for the note was already paid. On this head the evidence is very satisfactory. The cashier of the bank tells us that the note here sued on had been discounted by the bank and ~~was~~ their property, that it has never sold it or disposed of any notes that have been discounted there, and that the note could not have been got out of the bank but by payment of it. Another officer of the bank swears it was paid and taken up by the plaintiff about three o'clock of the day on which it fell due.

"It results clearly from this testimony that the appellee did not purchase this note from the bank; that it was not negotiated to him, but delivered to him on his paying the amount. The payment, therefore, inured to the maker, and no matter from what motive it was made, the note could not afterwards be protested, for it was already honored and discharged." 2 N. S. 500.

The judgment based upon notes which had been paid and extinguished should be annulled. *Beauchamp v. McMicker*, 7 N. S. 607; C. P. 607.

NO. 2947.—THE STATE v. JOHN S. VANDERGRAFF.

The voluntary declarations of the accused, made before the committing magistrate on a preliminary examination, and certified to by him in the presence of two witnesses, in conformity with section 1010 of the Revised Statutes of 1870, can not be offered in evidence or used on the trial before the jury by the accused. Declarations so taken are intended only to perpetuate for the use of the State such confessions as the accused may choose to make.

APPEAL from the First District Court for the parish of Orleans. *Abell, J. Simeon Belden*, Attorney General, for the State. *Given Campbell* and *E. Morell*, for defendant and appellant.

HOWE, J. The defendant, having been found guilty of manslaughter, was sentenced to imprisonment at hard labor and has appealed.

The only point urged before us arises upon a bill of exceptions reserved to the refusal of the judge below to admit the voluntary declaration of the accused, made in accordance with the Statute before a committing magistrate, as testimony for the defense.

The declaration in question, considered in the light of familiar rules of evidence, is certainly a singular document to be offered by the defendant in a criminal cause.

In the first place, it is made by the party in whose favor it is offered; in the second place, it is not made under the sanction of an oath; in the third place, it is made in such a way as to deprive the State of any opportunity of cross-examination; in the fourth place, the State can not impeach the credibility of him who makes it.

The Statute, under which this paper was offered by the defendant, R. S. 1870, § 1010, provides, that it shall be the duty of the committing magistrate to receive the voluntary declaration of the person accused and the answers which, without promise or threat, he shall make to the questions which the examining magistrate shall put to him, and cause them to be reduced to writing and signed by the prisoner in his presence and that of two witnesses, or if he can not sign, to mention that circumstance and to certify the declaration with his signature and that of two witnesses, which declaration, thus certified and signed, "shall be evidence" before the grand and petit juries.

It is contended by the appellant that the phrase "shall be evidence" means that the declaration shall be evidence for the prisoner as well as the State; but we can not assent to this interpretation, which is not a necessary one, and is calculated to make the Statute repugnant to well established principles of criminal jurisprudence.

Referring again to the fundamental rules of evidence alluded to above, considering that the declaration is to be purely voluntary, without promise of reward or threat of punishment, and so witnessed and certified as to make it legally certain that it was thus made by the accused, and observing that it is permitted to be used as evidence

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before the grand jury, whose proceedings are secret and *ex parte*, and before whom the prisoner is not permitted to be heard, we must conclude that the object of the Statute is simply to perpetuate for the use of the State such confessions or admissions as the accused may choose to make, in such way that they may be proved without calling the witnesses before whom they were made; thus substituting a convenient and permanent record of a confession for uncertain oral testimony in regard thereto; that the phrase "shall be evidence" does not necessarily imply, as understood, the words "for the prisoner;" and in fine that the Legislature, whose intent we are seeking, never intended by this provision to nullify the reasonable rules that a party shall not manufacture evidence in his own favor; that testimony shall be delivered under the sanction of an oath; and that the opposite party shall have the right to prove by cross-examination and impeach by evidence of bad character.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2600.—SARAH E. DOYAL, wife, etc. v. HENRY R. DOYAL and others.

Though the personal obligation of universal legatee, to pay a particular legacy is joint, and hypothecary obligation is solidary.

The legal mortgage in favor of particular legatees on the property of the succession, withheld by the universal legatees, must be recorded as against third persons, 22 An. 391, but it need not be recorded as against the universal legatees themselves. They are not "third persons," but "contracting parties," by *quasi* contract, resulting from their acceptance of a succession or universal legacy, subject to the payment of a particular legacy. C. C. (1835) 2314-15-16.

This legal mortgage in favor of particular legatees is a right distinct from the *privilege* resulting from the separation of patrimony; and therefore the article 3242 of the Code of 1825, which requires the *privilege* to be recorded within three months from the opening of the succession, does not apply to this mortgage, which may exist without record as long as the obligation to which it is accessory.

A PPEAL from the District Court, parish of Ascension. *Beauvais, J. Johnson & Denis*, for plaintiff and appellee. *Elmore & King*, for defendants and appellants.

HOWE, J. The plaintiff instituted this action against the defendants, the universal legatees of Henry Doyal, deceased, to recover a particular legacy of \$10,000 bequeathed to her by the will of the latter. The court below gave judgement in her favor against the four defendants, respectively, each for the virile portion, \$2500, with mortgage for the whole amount of \$10,000 upon the immovables of the succession bequeathed to the defendants and withheld by them.

The defendants appealed. They admit the portion of the decree which gives the personal judgment to be correct, but complain of that part which recognizes the mortgage for the whole claim of plaintiff.

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The appellee, in her answer, claims an amendment of the judgment in her favor, so that she may recover from one of the defendants, Henry R. Doyal, the full amount of the legacy, on the ground that, by the terms of the will, he is bound to discharge the same in full.

We do not think that, by the terms of the will, Henry R. Doyal is bound for any more than his virile share of one-fourth. The evident intention of the whole instrument was to make a perfect equality between the four children, defendants herein, and to have this particular legacy discharged out of the first crop of the Mount Houmas plantation, to be sure, if practicable; but otherwise, and under other circumstances, like those which have since occurred, by the succession at large. We do not think, therefore, that the court erred in giving the personal judgment against H. R. Doyal for one-fourth only of the claim, being an amount "in proportion to the part that falls to him in the succession. C. C. [1626].

Nor do we think the court erred in decreeing the mortgage for the whole amount of \$10,000 upon the immovables of the succession withheld by the defendants. The mortgage is established by the article already cited, which declares that the heirs of the testator, or the debtors of a legacy, shall be personally bound to discharge it, each in proportion to the part that falls to him in the succession; and that they shall be bound by mortgage *for the whole* to the amount of the value of the immovable property of the succession withheld by them. It is matter of legal history that this mortgage was established in the Roman law by the Code of Justinian, Law 1, *Communia de Legatis*, etc.; that the question whether the hypothecary obligation could be any more extensive than the personal, was a subject of dispute among jurists in France, Bacquet and Renusson maintaining the affirmative, and Pothier the negative; that the Code Napoleon adopted the views of the former in its article 1017; and that the Legislature of Louisiana have done the same in the similar article above quoted. Delvincourt, vol. 2, p. 364, n. 3.

But it is contended by the appellants that the mortgage was not recorded at the time of the rendition of the judgment (May, 1863); that it had never in any way been recorded within three months from the opening of the succession, and that it had therefore been lost, and they refer to the case of *Ogle v. King*, 22 An. 391, and to art. [3242] of the Civil Code. The case of *Ogle v. King* involved a contest between a particular legatee and a third person, a conventional mortgage of the heirs, and we held that the legal mortgage, established by article [1626], must be recorded as against this third person. But the defendants in this case are not third persons. They are the contracting parties themselves, by *quasi* contract, resulting from their acceptance of a succession or universal legacy, subject to the payment.

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of a particular legacy, and the mortgage, as to them, required no recording. C. C. [3314-15-16]. The article [3242], which is mainly relied on, declares that creditors and legatees who demand a partition of the patrimony of the deceased, preserve their privilege as against the heirs or representatives of the deceased on the immovables of the succession only by recording the evidences of their claims against the succession within three months after it is opened, and that before the expiration of this time no mortgage can be enforced [established] against the property, nor any alienation be made by the heirs or representatives of the deceased to the injury of the creditors of the succession. It is urged that the mortgage of plaintiff has been lost because it was not inscribed within the three months.

But we apprehend that there is a wide difference in purpose and effect between the legal mortgage of article [1626] and the privilege of article [3242]. We have not been referred to any decisions of this court upon the question, but the French commentators on the corresponding articles, 1017 and 2111, C. N., recognize the distinction.

Duranton says: "Legatees have, according to article 1017, a mortgage on the immovables of a succession; and, *besides*, a privilege in virtue of article 2111. This mortgage is entirely independent of the effect of the separation of patrimony." Vol. 19, 289.

Demolombe, commenting on article 1017, declares that it provides three actions—personal, real and hypothecary—and adds: "It will be recollected that legatees have, besides, a fourth security in the right which belongs to them to demand a separation of patrimony." Proceeding to notice the historical origin of this legal mortgage, he discusses its status in the French Code, combats the idea that it no longer exists, and that it is supplanted or impaired by the privilege mentioned in article 2111, and concludes: "The legal mortgage exists, then, still under our Code for the benefit of legatees at the same time with the right which belongs to them to demand a separation of patrimony; * * * each has its peculiar advantages." Vol. 21, pp. 266, 273.

Again, under the head of successions, vol. 17, No. 217, the same writer says: "Very different opinions have been expressed on the simultaneous existence in our Code of the legal mortgage of legatees in virtue of article 1017 and of the privilege of separation of patrimony in virtue of articles 2111 and 2113. One opinion, and a prominent one, has pretended that this mortgage is not a right distinct from that of the separation of patrimony, and that the hypothecary security of article 1017 has been swallowed up entirely in the theory of the separation of patrimony of articles 2111 and 2113. * * *"

But we believe that the legal mortgage of legatees has lost nothing, and the separation of patrimony has gained nothing, for the simple reason that there has been no fusion between them, and that they have

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not ceased to form two distinct rights." Comp. Merlin, Rep. v. Separation, etc.; *Troplong des Hypoth.*, vol. 2, No. 432, *bis*; Toullier, vol. 7, No. 240.

"The legatees have at once, in our view, a legal mortgage in virtue of article 1017, and the privilege of separation of patrimony in virtue of articles 2111 and 2113. Each of these rights is sometimes more and sometimes less advantageous than the other. Thus, the separation of patrimony has over the legal mortgage this double advantage, that it assures a right of preference, not only on the immovables, but also on the movables; and that it secures a right of preference on the immovables with retroactive effect when the inscription is made within six [in Louisiana, three] months from the opening of the succession; while the legal mortgage, on the other hand, has this double advantage over the separation of patrimony, that it can be exercised even when the legatee has accepted the heir as a debtor, and that it enjoys the prerogative of indivisibility."

We conclude that the action of separation of patrimony and the resulting privilege established by observing the formalities of article [3242], intended, as they were, to give the creditor or legatee of the deceased a right of preference on his property as against the creditors or vendees of the heirs, have no reference to the case at bar, and that the judgment ought not to be disturbed.

Judgment affirmed.

No. 2910 —SUCCESSION OF CONRAD FOSTER—Application of Claimants of the Estate for Account of Administration and to be put in possession.

If a cause has been regularly set down on the docket for trial, and the plaintiff does not appear, either in person or by attorney, to plead his cause, the defendant may require that judgment of nonsuit be rendered against such plaintiff with costs. C. P. 536.

In such judgment the words "as of nonsuit" are not essential.

APPEAL from the Second District Court, parish of Orleans. *Durignaud, J. McGloin & Kleinpeter*, for plaintiff and appellant. *N. Commandeur*, for defendant and appellee.

TALIAFERRO, J. D. H. Voss and John D. Voss, alleging that they are the sole heirs of their late brother, J. Conrad Voss, deceased, who was generally called and known by the name of J. Conrad Foster, who died in the parish of Jefferson, Louisiana, in September, 1865, intestate, leaving no heirs in the ascending or descending line, institute this action against Anna Maria Ossing, late widow of Conrad Foster and her present husband Gogreve, to compel the filing of an account by Mrs. Gogreve of her administration of the estate of Foster and to be put in possession thereof as his only heirs. The answer is

a general denial. The defendant excepts that the attorneys who instituted the suit, were not authorized by the alleged claimants to bring this action. She avers that she is the sole heir of her late husband Conrad Foster, and as such, after having duly administered on his estate, was put in possession of the same. She avers that, should the plaintiffs be recognized as heirs, she would still be entitled to the usufruct of the estate during her life. She prays that the plaintiffs' pretensions be rejected and their suit dismissed.

It appears from the record that suit was originally brought by the plaintiffs against the defendant on the same cause of action in the district court of the Second Judicial District, but was discontinued by the plaintiffs and the present suit commenced in the Parish Court of Jefferson on the ninth of December, 1868. The case was fixed for trial on the twenty-ninth of April, 1869. In May following, the defendant, by counsel, filed an exception and motion to dismiss on the ground that upon discontinuing their suit in the district court, they had not paid the costs before bringing the present suit. The case was continued to the twenty-first of May, when the following order, dismissing the suit, was rendered: "This case, continued to this day, was called up. Plaintiffs not present, and not represented by their counsel, McGloin & Kleinpeter; present, N. Commandeur of counsel for defendant; and, on motion of N. Commandeur, of counsel for defendants, Mr. and Mrs. Gogreve, it is ordered that this suit be dismissed at plaintiffs' costs."

A motion for a new trial was filed, the trial of which, it seems, was fixed on the sixth of October. No action, it seems, was ever taken in regard to it. On the twenty-third of December the plaintiffs again brought suit against the defendant on the same cause of action, their petition being the same as in the second suit which was dismissed. The defendants again excepted as in the previous case, and, besides, set up the plea of *lis pendens*. This exception was not tried, and no further action was taken in regard to it, so far as shown by the records. On the thirteenth of June, 1870, the plaintiffs took this appeal from the judgment by which their second suit was dismissed on the twenty-first of May, 1869.

The plaintiffs contend that if defendant was entitled to a judgment against them, it was only a judgment of nonsuit, whereas the judgment, not expressing that it was so rendered, may be taken to imply a rejection of their demand, which might be fatal to their claims. We regard the judgment complained of as a judgment of nonsuit. Under the pleadings, the court could have rendered no other judgment. The action of the court was clearly predicated upon the provisions of article 536 of the Code of Practice, which directs that "if, after the cause has been set down on the docket for trial, the plaintiff does not

appear, either in person or by attorney, to plead his cause, on the day fixed for trial, the defendant may require that judgment of nonsuit be rendered against such plaintiff with costs." It was not essential that the words, "as of nonsuit," should have been added.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs. See the case *Phillipe Allinet v. His Creditors*, 15 An. 130.

No. 2406.—ALEXANDER NORTON *v.* DAVID JAMISON.

A judgment rendered against a party who, though cited, dies before issue is joined, is null.

Therefore, in case the defendant dies after citation but before issue is joined, it is necessary to make his legal representatives parties to the suit, who must be cited. Otherwise the judgment rendered is void and inoperative as well against the defendant, deceased, as against his heirs or legal representatives, and the recording of such judgment creates no legal mortgage against the deceased or his legal representatives. The insertion of the word *heirs* in the final decree gives it no legal force or effect against his heir or legatee. Nor does the subsequent appearance of the heir or legatee, for the purpose of taking an appeal, give such effect to the decree rendered by the inferior jurisdiction as to give effect to the inscription thereof from the date that it was rendered in the court below.

Mortgages are *stricti juris*, and must, of themselves, be complete and give all the information which the law intends is necessary for third parties. Therefore, a judgment that has been rendered against a party who died before issue was joined, although recorded, does not operate on the property of his heir or legatee, who was not made a party to the suit, and a third purchaser of property from the legatee, after the rendition and recording of such judgment, is not affected by any mortgage resulting therefrom.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Miles Taylor and Billings & Hughes*, for plaintiff and appellee. *Campbell, Spofford & Campbell*, for defendant (plaintiff in injunction) and appellant.

HOWELL, J. In a hypothecary action plaintiff obtained an order of seizure and sale against the property of defendant, as third possessor, by purchase from James Dick Hill, in February, 1859, upon a judgment rendered in the United States District Court, Eastern District of Louisiana, on the ninth December, 1856, and inscribed twentieth June, 1857, which is in the following words and figures:

<p>"Alexander Norton, owner of steamer Western World, v. Steamer H. R. W. Hill, claimants and sure- ties, and Thomas H. Newell, master.</p>	}	<p>No. 685—In Admiralty.</p>
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"*Final Decree.*—The court having taken under advisement and carefully examined and considered the claimants' exceptions to the admiralty commissioner's report and assessment, and being satisfied from an examination of the evidence and the law bearing on the case, that the assessment of the commissioner is correct and that the libellant is entitled to recover the full amount claimed in his libel,

namely, the sum of \$57,000; and it appearing of record, that the steamer H. R. W. Hill, on which the libelant has a lien and privilege for the satisfaction of his demand, was released from seizure herein March 15, 1853, on a bond or admiralty stipulation executed by Thomas H. Newell, part owner, on his own behalf and also on that of James W. Dyas, of New Orleans, and Amelia Hamilton, of Nashville, Tennessee, the other owners of said boat and claimants thereof, as principals, and by H. R. W. Hill and Robert Dyas, of New Orleans, as sureties, in the sum of \$52,500, the appraised value of said boat, whereby the claimants and sureties did jointly and severally bind themselves, their heirs and administrators to pay the said libelant the amount awarded by the final decree in this cause; and it appearing, further, that Thomas H. Newell, as master of said boat, was personally cited, according to law, to answer the demand of the libelant: Now, therefore, the court doth order and adjudge, and it is hereby accordingly ordered, adjudged and decreed that the libelant, Alexander Norton, recover of and from the said claimants and sureties and the respondent, Thomas H. Newell, the full sum of \$57,000 and costs of suit to be taxed by the clerk, and that for the recovery of \$52,500 of said amount he be entitled to process of execution against the aforementioned claimants and sureties, jointly and severally, their heirs, executors and administrators, according to the tenor of said bond or admiralty stipulation of March 15, 1853, now of record in this court."

On appeal to the United States Circuit Court, this judgment was affirmed on the seventeenth November, 1858, and in December, 1865, was affirmed by the United States Supreme Court, "with costs and interest until paid at the same rate per annum that similar judgments and decrees bear in the courts of the State of Louisiana," and a mandate of execution directed to the Circuit Court in this State.

H. R. W. Hill, surety on the release bond, died in September, 1853, more than three years prior to the date of the judgment in the United States District Court, leaving James D. Hill his sole heir and legatee, who accepted the succession purely and simply, and when the appeal to the Circuit Court was taken, he became a party principal to the appeal bond for \$500 for costs. On the sixth November, 1858, he made himself a party to said cause in the Circuit Court and joined in the appeal to the United States Supreme Court. On twenty-seventh February, 1859, he sold the property in question, which he inherited from his father in 1853, to the defendant, Jamison, and in the act of sale reference is made to the above judgment for \$57,000, against which the vendor bound himself to protect the vendee, and in the certificate of mortgages annexed to said act the said judgment is set out as in the name of H. R. W. Hill and J. D. Hill and recorded against the property transferred.

The defendant enjoined the seizure on several grounds, only one of which we think it necessary to consider, to wit: That there is no judicial mortgage affecting his property, because H. R. W. Hill, surety, was dead long before the judgment against the claimants and sureties was rendered, and the suit was not revived as to his legal representative and heir, J. D. Hill, and the inscription does affect the property of defendant.

This, we think, is a correct legal proposition. If defendant die after issue joined, his heir should be cited; until this be done judgment can not be given against the succession. 5 N. S. 431. A judgment against one, who, though cited, dies before issue joined, is null. 8 An. 80. When H. R. W. Hill died, it was necessary to make his legal representative a party, otherwise the judgment was inoperative as to either, and the recording of it created no judicial mortgage on the property left by H. R. W. Hill. The fiction of law or its express enactment, by which he was a party to the proceedings, did not make his heirs or legal representatives parties in his person, and the insertion of the word "*heirs*" in the decree gave no force to the judgment against his heir and legatee any more than a judgment against any person, *eo nomine*, who is not cited. The subsequent appearance of J. D. Hill as a party to the proceedings, in order to appeal from the Circuit Court to the Supreme Court, may have made him personally liable under the judgment rendered on appeal, but it could not retroact so as to give force to the inscription of the judgment of the District Court. Inscriptions of mortgages are *stricti juris* and must, of themselves, be complete and give all the information which the law intends is necessary for third parties. 5 N. S. 112; 7 An. 533. The judgment recorded was against H. R. W. Hill, but plaintiff alleges that H. R. W. Hill died before the judgment was rendered, and claims that its inscription affected the property of J. D. Hill. But the inscription does not contain the name of J. D. Hill. At the time of the rendering and recording of the judgment against H. R. W. Hill the property in question did not belong to him, and no judgment against J. D. Hill was recorded at the date of his sale to defendant. Consequently, no judicial mortgage attached to the property sold by J. D. Hill to the defendant by recording the judgment in question against H. R. W. Hill, rendered after his death.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of David Jamison, perpetuating the injunction herein, with costs in both courts.

No. 2935.—SUCCESSION OF GROSS.—Administration and Tutorship of the Minor Heirs.

23	106
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A tutor is not entitled to charge the estate of his wards with board, if it be shown that they, the minors, were rendering him services in his house in attending to his household affairs, during the time he had them under his charge, to an amount sufficient to compensate him for their board.

Private books, kept by the tutor of amounts of money furnished and given to his wards, do not make proof in behalf of the tutor who has kept them. C. C. 2249.

A tutor who has property of his wards under his charge which yields a revenue, is personally liable, if he fails to collect the rent as it becomes due. The tutor also owes five per cent. per annum on all sums of money in his hands belonging to his wards which he has failed to invest. Sec. 3826, Revised Statutes of 1870.

The tutor is entitled to charge ten per cent. on the amount of the revenues of his wards as a commission for administering their estate.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. A. Commandeur* and *Cotton & Levy*, for the Tutor, appellant. *D. C. Labatt* and *R. L. Preston*, for the Heirs, appellees.

TALIAFERRO, J. This controversy has grown out of the administration of the successions of Henry Gross and wife and the tutorship of their minor children. Gross died in July, 1860; his wife some years previous. John Ulmer was both administrator and tutor. He filed his accounts of administration on the sixth of June, 1866, which seems to have been duly advertised and regularly homologated, no opposition having been made. By this account, it appears the administrator had in hand as assets of the estate \$4788 25, out of which he paid the debts, amounting to \$1618 14, leaving a net balance of \$3170 11. There were three minors, two girls and a boy. The property consisted of a house and lot of ground in the parish of Jefferson, a house and lot of ground in the upper part of the city of New Orleans, and \$3170 11 in the hands of the tutor. In January, 1870, the youngest of these wards, Henry, having attained the age of eighteen years, was emancipated. The administrator and tutor was required to make final settlements and put the heirs in possession of their property. His account was filed in May following. By this account it appeared that the total amount collected and received by the administrator and tutor was \$6234 29, and the total sum paid out \$9707 75, showing an excess of \$3473 46 over the assets. This account was opposed by the heirs, and a protracted litigation ensued. The judge *a quo* sustained to a great extent the opposition to the account, and rendered a judgment greatly reducing the charges of the tutor and establishing a balance against him. From the judgment thus rendered the tutor has appealed.

The real estate, it is shown, has yielded a revenue since the death of the minors' parents, which the district judge found, from the voluminous evidence introduced, to amount on an average to \$450 per annum, and that the sum of \$1436 36 cash in hands of the tutor might.

have produced one hundred dollars per annum more, had the tutor invested it, as was his duty to do by law. The minors' revenue would then have been \$550 per annum. The charges made by the tutor for board and money furnished the minors constitute the items principally reduced. The charge for board was properly rejected *in toto*. The evidence is conclusive that from the commencement of the tutorship, the minors, and especially the two girls, were able to render and did render services in the house of the tutor while with him, and during a part of the time they lived with other families on service at small wages. It is shown that their services were amply worth their board. In like manner it seems to be shown that the boy was by his services able to compensate the expense of board. The charges for money furnished the minors are not fully sustained by the evidence. These charges the tutor aimed to establish by the exhibition of an account book kept by him and by other evidence. To the introduction of this private book of the tutor an objection was made, but it was overruled by the judge, and a bill of exceptions reserved. We think the exception should have been sustained. Domestic or private books do not make proof in behalf of those who have written them. C. C. 2249 [2245]. The oral testimony in regard to the money charged by the tutor is exceedingly contradictory and uncertain. It being fully proved that by proper economy in his administration, the tutor might have avoided expending the least part of the capital of his wards, his exhibit of a large balance against them is manifestly wrong and was justly rejected. He was properly charged, also, with the rent of the property for two years which he failed to collect. By the judgment of the court below the tutor was held liable for the following amounts received during his administration: \$1436 36 received from the succession, \$5487 received in rents of property, the aggregate being \$6923 36. This sum he is condemned to pay after deducting the various credits allowed; the remainder to bear interest at five per cent. per annum after judicial demand. The tutor is also condemned to pay interest at eight per cent. per annum on \$1436 36, the amount not invested, from August, 1860, until paid.

The judgment is erroneous as to the rate of interest the tutor should be required to pay. Five per cent. by the present law is fixed as the rate of interest tutors are bound to pay on money of their wards not invested by tutors, as required by law. C. C. 347 [341]. Revised Statutes, page 744, Sec. 3826.

There is an omission by the judge *a quo* in not awarding the tutor his commissions. In respect to the rate of interest prescribed by law to be paid by tutors where they fail to invest the money funds, and in regard to the commissions of the tutor in this case the judgment should be amended.

It is therefore ordered, adjudged and decreed, that the judgment, so far as it decrees the tutor to pay eight per cent. per annum on \$1436 36, be annulled and reversed. It is further ordered, that the tutor be condemned to pay on the said sum of \$1436 36, interest at five per cent. per annum from August, 1860, until paid; and that he be allowed ten per cent. commissions on the amount of the minors' revenues, to be deducted as a further credit from the sum fixed by the court below as due by the tutor to the minors; that, as thus amended, the judgment of the lower court be affirmed.

Rehearing refused.

No. 1047.—ROBERT MCNAMARA v. JOHN CLARK.

By a failure on the part of one of the contracting parties to comply with the stipulations of the contract, the other party may, by first putting him in default, recover the damages sustained on account of such failure.

APPEAL from Sixth District Court, parish of Orleans. *Duplantier, J. James D. Augustin and S. Myers*, for plaintiff and appellee. *Buchanan & Gilmore*, for defendant and appellant.

This case was tried by a jury in the court below.

LUDELING, C. J. In May, 1863, Robert McNamara and John Clark entered into an agreement whereby the latter agreed to pay the former fifteen hundred dollars to excavate the foundations of a draining machine within two months from the date of the agreement. The plaintiff commenced the work and progressed with it until he was stopped by the overflow of back water from Lake Pontchartrain. The defendant then proposed that if the plaintiff would build a road over which to carry the pump to the excavation, he would furnish a steam pump. This was acceded to by the plaintiff and the road was built. After some delay the plaintiff wrote a letter to the defendant, complaining of the non-observance of his part of the contract and notifying him that he was ready to proceed with the work as soon as the steam pump was furnished. The defendant did not furnish the pump and the plaintiff quit the work and instituted this suit for damages.

The case was submitted to a jury, who rendered a verdict in favor of the plaintiff for two hundred and fifty dollars. The term of the first agreement was extended by the second agreement; the plaintiff performed his part of the second contract and put the defendant in default. C. C. 1913 [1907]; 3 La. 385.

We see no good reason to disturb the verdict of the jury.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Davidson v. Carroll, Hoy & Co.

No. 2274.—JOHN DAVIDSON v. CARROLL, HOY & CO.

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The reasons given by the court for judgment form no part of the judgment itself, and the judge of the lower court is not bound by any expressions used by the Supreme Court outside of the decree. Therefore, the decree of the Supreme Court which remands the cause to be proceeded with according to law, can not be taken by the judge *a quo* as finally deciding the questions at issue between the parties.

A PPEAL from Seventh District Court, parish of Orleans. *Collens, J. Lacey & Butler* and *J. D. Hill*, for plaintiff and appellant. *Randolph, Singleton & Browne*, for defendants and appellees.

HOWELL, J. This case was before this court in 1868, and is reported in 20 An. 199, where the facts are succinctly stated. This appeal is taken by plaintiff from a judgment awarding to defendants a *pro rata* portion of the proceeds of certain property sold in the suit of *Davidson v. Davis & Cofield*.

In the former appeal, the court, after stating the law, that defendants, Carroll, Hoy & Co., who were the sureties of Davis & Cofield for the payment of certain mortgage notes of plaintiff, as a part of the price of the property in question; were bound to, and not for, plaintiff, and in paying said notes to the holders extinguished the debt of plaintiff and acquired no mortgage or privilege on the property, used the following language: "By effect of sale from Davidson to Davis & Cofield, the vendor's privilege was created on the land to secure the payment of the assumption they made to pay his notes, as well as to secure payment of their own notes, which they gave to him; and Carroll, Hoy & Co. have, by legal subrogation, the vendor's privilege on the land, which avails as a mortgage to secure the amount they paid as securities on the assumption of Davis & Cofield, with interest, and they must be paid out of the proceeds of the land ratably with Davidson." So much of the judgment, then appealed from, as decreed that defendants had no mortgage or privilege, was reversed, and the case was remanded to be proceeded with "according to law."

The district judge considered the above opinion as authority binding upon him and as finally deciding the legal rights of the parties, and that he only had to settle the proportions of each party thereunder; and the defendants maintain the same position before us.

It is well settled that the reasons for judgment, strictly speaking, form no part of the judgment itself. The decree in this instance simply reversed a portion of the judgment appealed from, and remanded the cause, to be proceeded in *according to law*. This left the question embraced in that portion of the judgment undecided, and directed that the case should be tried *according to law*.

It seems clear that, under the law and the facts presented in the record now before us, the defendants, as securities to plaintiff and bound to see the notes in question paid to the release and acquittance of plain-

Davidson v. Carroll, Hoy & Co

tiff, can take nothing until he is fully paid, that is, they can take only in case there is a surplus coming to their principals, Davis & Cofield, for whom they were sureties. This was practically decided in the first portion of the former opinion, and what was said in that part above quoted, does not preclude us from passing on the question as one of law, inasmuch as the decree leaves it open.

It is therefore ordered, that the judgment appealed from be reversed; and it is further ordered, that there be judgment in favor of plaintiff for the amount of the proceeds of the property in controversy in preference to the defendants, who can take only after the amount due plaintiff and his bonders is paid. Defendants to pay costs in both courts.

Rehearing refused.

No. 1704.—PETER ROSS v. S. JOHNSTONE.

In a suit on a promissory note against the maker, parol evidence is admissible to show an interruption of prescription. Section 2 of the act of 1858, No. 208, page 148, requiring written evidence to prove acknowledgment so as to interrupt prescription by persons deceased, does not apply to cases where the maker of the note is living.

The burden of showing that the note sued upon has been paid, falls upon the party who makes the plea; and the exhibit of an open account against the holder of the note, can not be pleaded in compensation or payment of the note.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Fellows & Mills*, for plaintiff and appellee. *Edmund O. Kelley*, for defendant and appellant.

WILY, J. The defendant, sued as the maker of a promissory note, has appealed from the judgment against him thereon.

The defense is the plea of prescription of five years and the plea of payment.

Our attention is directed to the bill of exceptions taken by the defendant to the introduction of parol testimony to prove the interruption of prescription. We think the evidence was properly received by the court; and the act of 1858, requiring written evidence to establish renunciation of prescription, has no application whatever to the character of evidence necessary to prove an interruption of prescription. The evidence adduced establishes the interruption.

As to the plea of payment, it was the duty of the defendant making it to prove it affirmatively and beyond doubt. This he has not done.

The transactions of the parties in the running account between them have no direct connection with the note declared on; and an open account can not be pleaded in compensation to a note.

We think the plaintiff should have damages for frivolous appeal, as prayed for. Let the judgment be affirmed, with ten per cent. damages thereon.

Succession of Marie Aimee Carraby.—On Opposition to Account, etc.

No. 2764.—SUCCESSION OF MARIE AIMEE CARRABY, deceased.—On Opposition of INES PEYROUX to Account of Tutor.

A judgment that has been signed by the judge after the lapse of three judicial days from its rendition, can not be opened by a new trial. C. P. 558. The remedy of the party aggrieved in such a case is by appeal.

APPEAL from the Second District Court, parish of Orleans. *Durigneaud, J. Charles Louque*, for appellants. *Charvet & Duplantier*, for appellees.

TALIAFERRO, J. The opponent obtained a judgment against Peyroux, tutor, on the fourteenth of April, 1869, which was signed on the nineteenth of that month. On the ninth of November following, Peyroux filed his application for a new trial, which was granted, and judgment was rendered on the second trial in January, 1870, dismissing the opposition and homologating the tutor's account. From this judgment and also from the order granting the new trial, the opponent has appealed. On hearing of the rule for a new trial, evidence was offered by the plaintiff in rule and objected to by the defendant, but was received by the court. The grounds of objection are embodied in a bill of exceptions, and are:

First—That a rule for a new trial can not be entertained after a judgment regularly rendered has been regularly signed, as was done in this case.

Second—That the judgment being final, a rule for a new trial was irregular, and that no evidence was admissible under it.

Third—That evidence can not be received touching matters concluded by the judgment.

Within three judicial days after the rendition of judgment, a party believing himself aggrieved by the judgment may pray for a new trial. C. P., art. 558. This right is not affected by a premature signing of the judgment. 5 N. S. 224; 4 An. 561; 6 An. 251; 20 An. 168. But when a judgment is signed after the delays prescribed by article 546 of the Code of Practice have expired, error in the judgment so signed can not be corrected by a new trial *ex officio*; the remedy is by appeal. 9 Rob. 50; C. P. 547; 6 L. R. 69. In the case before us, it seems the judgment was not signed until after the lapse of three judicial days. We think, therefore, the judge erred.

It is ordered, adjudged and decreed that the order granting the new trial and the judgment rendered thereupon and appealed from, be avoided and reversed; that the judgment first rendered by the lower court be recognized as in force, subject to such future action as may be legally taken in regard to it, the appellee paying costs in both courts.

Rehearing refused.

State ex rel. Montieu v. Lavigne.

No. 2917.—THE STATE ex rel. JOSEPH L. MONTIEU v. URSIN LAVIGNE.

The act of 1864, creating the office of tax collector for the several parishes of the State, was repealed by the statute of 1868, entitled "An Act to provide a revenue for the State government, and the manner of collecting the same." Therefore the office of tax collector, under the act of 1864, became extinct by the passage of the act of 1868, and such officer elected under that act must give way to the officer designated by the act of 1868 to collect the taxes.

In a proceeding under the intrusion act, No. 156 of 1868, to test the right to an office, the party claiming the office may be joined, and if it be ascertained that he is entitled thereto, he will be so recognized in the decree which pronounces the incumbent an intruder.

A PPEAL from Second District Court, parish of Jefferson. *Pardee, J. Z. McKay*, District Attorney, for relator, appellant. *Cotton & Levy and N. Commandeur*, for defendant and appellee.

This case was tried by a jury in the court below.

WYLY, J. The relator has appealed from the judgment on the verdict of the jury in favor of the defendant, who was proceeded against, under the "intrusion act" of 1868, for usurping the office of State tax collector for the parish of Jefferson, which said office is claimed by Joseph L. Montieu, by virtue of his appointment and commission from the Governor, dated twentieth April, 1870, under act No. 68 of the acts of 1870.

The respondent avers, in his answer, that at the April elections of 1868 he was duly elected State tax collector for the term ending the first Monday of November, 1870, or until his successor was elected; that having been duly commissioned by the Governor he qualified according to law, and has administered the office to date. "Respondent further specially pleads that he holds under and by virtue of the one hundred and fifty-fourth and one hundred and fifty-eighth articles of the Constitution of 1868 for the term above set forth, and that neither the Legislature nor the Governor can displace or remove him in the manner attempted."

It will hardly be contended that the articles of the Constitution relied on prohibited the Legislature from repealing the statute of 1864, creating the office of tax collector, to which the respondent was elected, because they contain no express prohibition; and, in the absence thereof, it is evident that the power to enact a law necessarily implies the power to repeal it.

The question is, was that part of the act of 1864, creating the office of tax collector, repealed by the act of twenty-first October, 1868, "An Act to provide a revenue to support the State government, and the manner of collecting the same." This act provides for the appointment of an assessor and defines his duties; it also provides, section 44, "that the assessor in each and every parish of the State, except the parish of Orleans, shall collect the State and parish taxes of his

State ex rel. Montieu v. Lavigne.

parish." And by section 78 all laws or parts of laws contrary to the provisions of this act are repealed.

If the statute of 1868 makes it the duty of the assessor of each parish, in addition to his other duties, to collect all State and parish taxes, and repeals all laws contrary to this provision, we do not see how the office of tax collector can exist, or how the officer elected to administer it can do so, without conflicting with the act of 1868 providing for that duty to be performed by another officer.

A fair interpretation of the law leads us to the conclusion that the office created by the act of 1864 and claimed by the respondent, was abolished by the sections of the revenue act of 1868 to which we have referred. Of course the term for which this officer was to hold, did not continue after the repeal of the law creating the office; for it would be absurd to say there is an unexpired term to an office that has ceased to exist.

The evidence shows that Joseph L. Montieu, appointed under the revenue act of 1870, is entitled to the office in dispute.

It is therefore ordered that the judgment appealed from be annulled; that Joseph L. Montieu be declared entitled to the office to which he was appointed under act No. 68 of the acts of 1870, and the respondent be excluded therefrom and be declared an intruder, and that he pay costs of both courts.

No. 1991.—CHAS. CASE, Receiver, etc. v. JOHN W. CANNON.

In case of insolvency, compensation cannot take place, if the debtor of the insolvent acquires the claim proposed to be compensated after the failure of the insolvent.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. D. Rouse and G. L. Bright*, for plaintiff and appellee. *R. & H. Marr*, for defendants and appellants.

LUDELING, C. J. This is a suit on two promissory notes, drawn by John W. Cannon, for \$3,500 each, maturing respectively twentieth May and nineteenth June, 1867.

The notes were discounted and held by the First National Bank of New Orleans. The bank failed on the thirteenth May.

The checks or bills of exchange drawn by the First National Bank of New Orleans, acquired by Cannon after the failure of the bank, can not be pleaded in compensation of the debts which he owed the bank.

When the Receiver was appointed, it became his duty to collect the debts of the bank and to pay over the money to the Treasurer of the United States, to be ratably distributed by the Controller among the creditors of the bank. U. S. Statutes at large, vol. 13, p. 114, sec. 50.

It is well settled in this State, that compensation can not take place when the debtor of an insolvent acquires the claim, proposed to be compensated, after the failure of the insolvent. 2 La. 82; 2 An., *Dwight et al. v. Carson*, Adm'r.

The appellee has prayed for an amendment of the judgment in his favor as against John W. Cannon, and we think the evidence fully authorizes the change prayed for.

The judgment against David C. McCann is clearly erroneous; there is no evidence to support it, nor is he a party to the suit.

It is therefore ordered, that the judgment of the district court as to David C. McCann be avoided and annulled; and it is further ordered and adjudged, that there be judgment against John W. Cannon for the sum of seven thousand dollars, with eight per cent. per annum interest from eighteenth of March, 1868, till paid, and six dollars and sixty cents costs of protest, and costs of both courts.

No. 2881.—MURDOCK & WILLIAMS v. CITIZENS' BANK OF LOUISIANA.

In a case of a confidential contract arising from irregular or special deposits with a bank, compensation does not take place, and the depositary is not authorized (under the pretense that a custom exists to that effect) to apply the funds on deposit to the payment of the debts of the depositor. 2 An. 25; 11 An. 73; 10 R. 200.

In this case, the evidence shows that a special deposit was made in coin; that the bank soon after suspended specie payment; that a promise was made by the bank and inserted in writing in the bank-book of the depositor, that so soon as the bank resumed specie payment, it would return the same in coin. The parties had subsequent transactions, predicated on Confederate notes as bankable funds.

The bank now seeks to avoid the payment of the deposit in coin, on the grounds that the depositor had, since the deposit, become indebted to it, which, by a custom among bankers, it had extinguished by crediting the amount on the indebtedness of the depositor; that it was authorized and protected in making this credit by a military order of the General of the army of the United States in command at the time.

Held—That if such a custom existed, the bank could not avail itself of it in this case, because the law did not authorize it unless under a special mandate from the depositor; that the bank could not claim protection under the military order, because the money was not taken from the vaults of the bank and appropriated to the payment of the debts of the depositor under such order.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. D. C. Labatt*, for plaintiffs and appellees. *Armand Pitot*, for defendant and appellant.

HOWELL, J. The plaintiffs have sued the defendant for the sum of \$2300, payable in coin, as the balance due them on deposit on the sixteenth September, 1861, when the bank suspended specie payment, and which sum, they allege, the defendant stipulated to keep as a special deposit, not to be drawn out until the end of the war. The defendant pleads the general issue, admits that plaintiffs had an account with it, which was closed on the tenth February, 1863, by the bank's taking in part payment of plaintiffs' indebtedness to it the

sum of \$2006 94, the balance then on deposit, and leaving the plaintiffs debtors to the bank in the sum of \$2093 06, with eight per cent. interest from August 9, 1862, which it claims in reconvention, on the following grounds, to wit: That it is the holder of a note for \$3100, made by Hughes, Hyllested & Co., indorsed by plaintiffs, duly protested on ninth August, 1862, and notice given to the indorsers; and a note of J. D. Richardson for \$1000, indorsed by plaintiffs, protested on twenty-third June, 1862, and notice given to the indorsers; that the balance of \$2006 94 to the credit of plaintiffs was applied on said tenth February, 1863, by the bank as follows: To the extinguishment of the Richardson note, \$1000, and part payment of the Hughes, Hyllested & Co. note, the sum of \$1006 94, leaving a balance due on said last note of \$2093 06, for which judgment is prayed, and it files a copy of plaintiffs' bank account extending from September 4, 1861, to February 10, 1863, showing the above figures.

The plaintiffs having alleged two distinct accounts, one prior and the other subsequent to the sixteenth September, 1861, and the loss of of their bank book, propounded interrogatories to the defendant to ascertain the exact amount due at said date; whether it has been drawn against and how; whether a new account was kept after Confederate money became bankable funds, and what is the condition of their account with the bank. To these the president answered, that the balance to the credit of plaintiffs on sixteenth September, 1861, was \$1084 83, and that plaintiffs continued to deposit and draw checks, as shown by the copy of the account filed; that they had but one account, and the balance to their credit on tenth February, 1863, was disposed of, as set out in their reconventional demand.

The account filed shows but one continuous account, which was balanced on twenty-fifth September, fourth October and ninth December, 1861, twelfth February and eighteenth March, 1862, and tenth February, 1863. The deposits and checks appear frequently and continuously from fourth September, 1861, to fourteenth April, 1862, and checks to first May, following, and on the tenth February, 1863, the appropriation was made as described by defendant. As a witness on the stand, the president of the bank states that it is a custom and standing rule with the banks of this city, when a depositor has funds to his credit and neglects to pay a note discounted by him, to debit him with the amount of such note; that when General Banks, by order No. 202, sequestered certain moneys, the names of plaintiffs were in the list furnished to the bank as being subject to the order, and the president of the bank obtained permission from the commanding general to deduct the balance in its favor from the notes as above described. To this evidence it appears plaintiffs' counsel objected, but as no bill of exceptions was taken, we can not notice the objections.

The following is admitted to be the *contract* in the lost bank book. "On the resumption of specie payment by this bank, your balance on the sixteenth September, 1861, or any portion thereof not drawn for, will be paid to you in coin. All deposits since that date are payable in treasury notes of the Confederacy, as proven in suit No. 20,124, Fourth District Court, Citizens' Bank v. Condran." The record of the suit of Citizens' Bank v. Murdock & Williams, in the district court, parish of Tensas, is in evidence. The suit was brought on the Hughes, Hyllested & Co. note, subject to the above mentioned credit, and the plea of prescription was interposed by the defendants therein, plaintiffs here, was sustained by the court and the judgment affirmed on appeal.

The clerk of the plaintiffs testifies that the balance due on sixteenth September, 1861, was \$2100 or \$2200; that two distinct accounts were then made, and that there was a special agreement with the bank that the said balance was to be kept as a special deposit until the end of the war; that it has not been drawn for; that no authority was given to the bank to make the appropriation, as was done, and that plaintiffs were not aware of it until he informed them after inquiring of the president if it was subject to the check of one of the plaintiffs. Murdock's deposition corroborates the foregoing in the main.

The first question is, has the coin balance to the credit of the plaintiffs, or any part of it, been drawn out by them? The president of the bank says it has been drawn against, as shown by the account filed. A reference to this account, in connection with the special agreement contained in the bank book of plaintiffs, does not sustain this position. It shows that, between the sixteenth September, 1861, the date of specie suspension, and the twenty-fifth of the same month, when the first balance was struck in said account, the plaintiffs had deposited more than they checked out; and at each subsequent date, when a balance was struck, the same fact appears. By the act of suspension of specie payments and the terms and intent of the "agreement" or "contract" in the bank book, the dealings, after the sixteenth September, were to be in Confederate treasury notes, and it was incumbent on the bank, under the above state of facts, to prove specifically that this particular coin balance was specially drawn for. It is not to be presumed that an ordinary check, after said date, was paid in coin, for the bank had suspended specie payments.

But the bank contends that the balance of \$2006 94 to the credit of plaintiffs on tenth February, 1863, which excluded the coin balance, was appropriated in part payment of plaintiffs' indebtedness on the two notes above referred to, and to establish this the testimony of the president as to a custom is relied on. It is true the president does state that such a custom exists, but the facts of this case, as stated by

him, show that this bank did not follow such a custom, if it existed. The two notes fell due, respectively, on June 23 and August 9, 1862, and the deduction or appropriation was not made until tenth February, 1863, and then only by special permission from the commanding general, as stated. If it was a custom with this and other banks to debit a delinquent depositor with the amount of his unpaid note, when he had funds to his credit, it would seem reasonable and business-like for the bank, in this instance, to have followed this custom and made the appropriation or debit when the notes fell due, and there would have been no necessity to appeal to military authority for permission to do so, some six or eight months afterwards. This action of the bank shows that it did not act upon, or have much confidence in, such a custom as, it is now pretended, existed.

In the case of *Morgan v. Lathrop*, 12 An. 257, it was decided that it is settled law in this State that in the confidential contracts arising from irregular deposits of this nature, compensation does not take place, and the depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from him, the depositor, or a course of dealing which will justify such application of the funds. See 7 An. 35; 2 An. 25; 10 R. 200; 11 An. 73. No such special mandate or course of dealing is shown in this case to justify such application.

The bank can not claim protection by a military order, for the money was not taken under such order. Nor can it profit by the result of the suit in Tensas parish, for this question was not raised there. The petition in said suit did not set out the manner in which the alleged credit on the note therein sued on was made, and, indeed, no mention was made of any credit, but the whole amount of the note was demanded, and the plea of prescription could not, under the circumstances, be an admission of the right to make the credit as claimed, if, indeed, it could under any circumstances. That plea is now become *res judicata* as to this note, and plaintiffs must recover the coin balance claimed by them. The judge *a quo*, however, erred in awarding more than this particular balance. The additional sum of \$922 11, allowed by him, appears to us, from the evidence and especially the bank book, to be in Confederate treasury notes, for which no judgment can be given.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that defendant's reconventional demand be dismissed; that plaintiffs recover of defendant the sum of \$1084 83, with legal interest from fifteenth June, 1861, payable in coin, and all costs in the lower court; plaintiffs and appellees to pay costs of appeal.

Rehearing refused.

Lucas, Wife et als. v. Ellen C. Brooks et als.

No. 1938.—R. A. LUCAS, Wife et als. v. ELLEN C. BROOKS et als.

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If the loss or destruction of an olographic will or a sealed letter, which it is claimed is a part of the will, be shown, the legatee claiming under the will or the sealed letter, may establish either the contents of the will or the sealed letter, so lost or destroyed, by secondary evidence. And if it be alleged and shown by the legatee, who claims under the sealed letter, that the universal legatee under the will, into whose possession the sealed letter came, fraudulently concealed or destroyed it, then, and in that case, the court will apply, in favor of the party claiming under the sealed letter as a part of the will thus lost or destroyed and against the spoliator, the maxim, *omnia præsuntur contra spoliatorem*. But this rule will not be applied unless the evidence makes it certain that the universal legatee, into whose possession the sealed letter came, concealed or destroyed it for the purpose of defeating its bequests.

Where a sealed letter, which accompanied the will, has been lost or destroyed, which sealed letter it is claimed constituted a part of the will, is sought to be established by secondary evidence as forming a part of the will, which has been admitted to probate, all the evidence necessary to establish the validity of an olographic will must be produced. The signature of the sealed letter, claimed to be a part of the will, must be proved in the same manner and by the same kind of testimony that are required to prove the signature to the will itself. If the evidence and presumptions in the record are sufficient to establish that the sealed letter was written and dated by the testator, this fact, coupled with the presumption that men generally sign all letters written by them, is not sufficient to justify the court in concluding that the sealed letter, claimed to be a part of the will, was signed by the testator.

APPEAL from the Second District Court, parish of Orleans. *Thomas, J. Campbell, Spofford & Campbell*, for plaintiffs and appellants. *Conrad & Son* and *C. Roselius* and *Alfred Philips* and *Randall Hunt*, for defendants and appellees.

HOWELL, J. James H. Shepherd died in New Orleans on the twenty-seventh of July, 1837, leaving no descendants, but a mother, four brothers, a sister and the children of a predeceased sister, residing out of this State. Among his papers was found an envelope bearing a superscription in his handwriting, as follows: "Inclosing J. H. S. will and a communication to R. D. Shepherd, in case of his death, Abraham Shepherd." Upon being opened by the probate judge on the twenty-ninth July, 1837, two documents were found, one indorsed:

"J. H. Shepherd

Last olographical will and testament.

New Orleans, December 22, 1832.

Wafer [J. H. S.] seal ;"

the other a sealed letter addressed to "Rezin D. Shepherd, or, in case of his death, Abraham Shepherd;" both indorsements in the handwriting of the deceased. The will was duly probated, Judah Touro and Jonathan Montgomery were appointed dative testamentary executors and they entered upon the administration of the succession, which was inventoried at \$616,694 69, and C. M. Conrad, Esq., was appointed attorney for absent heirs. The will is in the following words:

"I, James Harvey Shepherd, of the city of New Orleans, merchant, considering the uncertainty of this life, do make this, my last will and testament, as follows, that is to say:

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First—I give and bequeath unto my brother, Rezin Davis Shepherd, all my estate, real and personal, and he is hereby authorized to take possession of the same without the intervention of any court of justice; should he, however, not survive me a sufficient time to take full possession of my estate, I then leave the same to my brother, Abraham Shepherd, who is hereby authorized to take possession in the same manner as my brother Rezin Davis, should he survive me.

Second—I now revoke all former wills and testaments made by me, but this, my last, which I confirm.

New Orleans, December 22, 1832.

J. H. SHEPHERD."

In December, 1837, R. D. Shepherd, who resided in Baltimore, Maryland, was recognized as the sole heir and legatee under this will, and, after a formal renunciation by his mother, dated in September, 1837, was subsequently, by order of court, regularly put in possession of the whole estate and so continued as sole owner, using and disposing of it until his death, in November, 1865, when he bequeathed all his property, without distinction, to his daughter and her two sons, the defendants herein. The mortuary record of the succession of J. H. Shepherd does not show what became of the sealed letter addressed to R. D. Shepherd, but it appears in this record that it was handed to Mr. Touro in court on the day of the probate, to be forwarded according to its address, and that it came soon after into the hands of Rezin in Baltimore.

This suit was instituted in February, 1867, to procure from his legatees the production thereof, to ascertain its contents, import and intention, and to give authenticity and effect to it as a part of the will of J. H. Shepherd.

The plaintiffs, who are some of the children and descendants of Abraham and Henry Shepherd, brothers of the testator, allege that the said "sealed letter" was testamentary in its nature and import; was written, dated and signed by the said James H. Shepherd; that it has been concealed, suppressed and destroyed by Rezin D. Shepherd, whose duty it was, as well as of the said executors, to present it to the court for probate; that the two papers constitute the will of the deceased, the dispositions of which can be carried into effect, although upon the face of them there may be a purpose to evade the laws of Louisiana and there may be clauses in them which create substitutions and *fidei commissa*; that some of the provisions of the sealed letter, which radically changes the dispositions of the probated paper, have been carried into effect by the said Rezin, who admitted that it was obligatory in form and binding upon him in good conscience, and they propound the following as in substance the contents thereof, taken from a letter written by Abraham Shepherd to one Edmund J. Lee, to wit:

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"Extract from a letter to me from R. D. Shepherd, dated ninth October, 1838: Mr. Touro has the original letter in his possession, a copy of which you have seen, (I mean the sealed letter left by James with his will,) and this directs that mother shall renounce all claim to the estate and that Ann shall have only \$5000, Moses nothing, Eliza \$10,000, the residue to be divided amongst his nephews and nieces, double as much to the boys as girls; but all these things you know, as you have seen the letter."

"The sealed letter," adds Mr. Abraham Shepherd, "above alluded to also excludes expressly my brother Rezin's daughter from any part of this estate, stating as his reasons that Rezin would be enabled to provide amply for her himself. It contains also a legacy, I think, of \$2000 to George Lee, his clerk, and one of his gold watch to Mr. Touro. My brother Rezin is to have full control of the estate, after distribution of these legacies, during his life, with the power of excluding any of the nephews and nieces referred to, should they, by vice or crime, become degraded or unworthy. Such part of the estate as may be necessary for his use and comfort he is authorized to appropriate thereto, and is requested to make a will immediately that shall dispose of his estate at his (that is Rezin's) death agreeably to the above directions.

"The recorded will briefly devises the whole estate to R. D. Shepherd, and in case of his not acting, precisely in the same manner to myself, thus clearly intending that either of us should hold it subject to the instructions of his (James's) sealed letter, that is, as trustees for his nephews and nieces referred to.

(Signed)

AB. SHEPHERD."

In the original letter the words, "Henry's and my children," follow the words, "referred to," but are omitted in the petition.

The plaintiffs pray for citation of defendants and all parties interested, and that the authenticity and legal effect of said testamentary paper be established, an account of said succession be ordered, the rights of the parties as heirs at law or legatees under said will, including the sealed letter, be fixed and a partition made according to the laws of Louisiana applicable to this succession. They do not pray expressly or explicitly for the probate of the said document as the will of the deceased and an order for its execution, but in an annexed petition they declare that they have presented it for probate, and it may be the necessary implication of their allegations and object of their suit, otherwise there is no cause of action.

The defendants deny any knowledge of the "sealed letter," set up title under the will of Rezin D. Shepherd, the renunciation of his mother, the plea of *res judicata* and the prescriptions of five, ten and twenty years.

The first question for solution is: Is the "sealed letter" the will or part of the will, in olographic form, of James H. Shepherd?

A testament is the act of last will, clothed with certain solemnities, by which the testator disposes of his property, either universally or by universal title or by particular title. C. C. 1564.

The name given to the act of last will is of no importance. If it be clothed with the forms required for the validity of a testament and the clauses it contains or the manner in which it is made *clearly* establish that it is a disposition of last will, it is a valid testament. C. C. 1563.

The formalities to which testaments are subjected by the provisions of the code, must be observed, otherwise the testaments are null and void. C. C. 1588.

The olographic testament, to be valid, must be entirely written, dated and signed by the hand of the testator. C. C. 1581. It must be acknowledged and proved by the declaration of two credible persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his lifetime. C. C. 1648. And these declarations shall be taken in writing, signed by the witnesses and recorded. C. P. 939 *et seq.*

This proof has not been adduced in this case and no witness testifies to having ever seen the instrument under consideration. It is true, however, that a communication in writing addressed to, and received by, R. D. Shepherd, was found in the envelop with the will which was probated, and the plaintiffs have undertaken to prove it as a will lost or destroyed, upon the principle, which seems to be settled, that in case of the loss or destruction of an olographic will, the legatee may establish it by secondary evidence. See 11 An. 124 and authorities there cited.

In the effort to do this they allege and claim to have proved that the sealed letter was testamentary in its purport and was fraudulently concealed and destroyed by R. D. Shepherd, under the maxim *omnia præsuntur contra spoliatores* and the direct evidence adduced by them, and that under the operation of this maxim, together with the fact that men generally sign all letters written by them, we must presume that this letter, admitting it to be written and dated by the testator, was also signed by him. The fact that men generally sign their letters, can have little effect in proving the signature to an olographic will. It is just as necessary to prove the signature as the date and handwriting, and the failure to prove either one by some competent evidence will render the testament invalid. Custom is not admitted as proof of either. And the fact that private letters are sometimes not signed, will leave uncertainty at least. But conceding that the solemn formalities of an olographic will may be established in Louis-

iana by presumption, do the facts developed in the record warrant the application of the maxim, thus invoked against the defendants, and so supply the proof? We think not. It is clearly shown that in August or September, 1837, soon after the death of James and before Rezin came to New Orleans to take possession of the succession, Abraham, the father of some of these plaintiffs and an attorney at law, was shown a copy of this sealed letter and knew then as much of its character and contents as afterwards or as plaintiffs now do; and that in October, 1838, he wrote the letter, which is propounded as the substance of the will which they ask to be probated and in which is the extract from a letter of Rezin, informing him, and others through him, that the original letter, the "sealed letter," was then in the possession of Mr. Touro. In several other letters to Abraham during that and the succeeding year, Rezin alludes freely to the contents of this letter and his own views and purposes in regard to it. It was also equally known to the mother, when in 1837 she renounced, and to Moses, another brother. In August, 1839, Rezin wrote to his sister Ann, describing it fully and telling her that he had shown it to Abraham, to Mr. Touro and Mr. Montgomery, and had deposited it with his will. In the same month he wrote on this subject to E. J. Lee, also a lawyer and the surviving husband of his sister, Eliza, and to whom Abraham had, in October, 1838, written the letter copied in the petition. In April, 1844, he again wrote to Lee, giving the purport of said sealed letter; and in March, 1849, he wrote to Lee and his brother, Henry, the father of the other plaintiffs, on the same subject, giving his own construction of the letter and its scope and intent. Robert Lucas, connected with one of the plaintiffs, testifies that, in 1859, he alluded to the contents of said letter in a conversation with Rezin, who replied that he then had it. The depositions of Lee, William Lucas and others show that the existence, nature and contents of said letter were known to, and frequently discussed by, the several branches of the Shepherd family soon after the death of James and since.

Under these circumstances there was no such concealment, suppression or deception as to authorize the invocation of this maxim against Rezin himself. A very strong case must be presented to warrant the charge, under any circumstances, that a private sealed letter has been concealed or suppressed, to the prejudice of third parties, by the person to whom it is written. The law and society attach deserved inviolability to private correspondence, and courts of justice are careful rather to guard than invade that inviolability. The action of the probate judge in turning over this letter to those seeking the probate of the will, to be delivered as addressed, was in accordance with, and justified by, this principle.

There is no proof in the record that Rezin destroyed this letter, and the defendants never saw it. The destruction of books and papers, which occurred in 1855, was of mercantile effects, and prior to the date at which plaintiffs prove it to have been in existence. No one ever made a demand on Rezin for the production or view of the letter, or took any step to assert any right under it during his lifetime. The plaintiffs or their parents have known for thirty years what they now know, and what they ask the court to accept as a will. If it was believed that this "sealed letter" contained testamentary dispositions in favor of those now claiming, its production could have been secured during the lifetime of Rezin, or at least the proper effort should have been made

But can this presumption, if applicable as against Rezin, be invoked against these defendants, who, it is admitted, know nothing of the existence or nature of the letter? The charge made is a crime, and it is carrying the doctrine too far to apply it to parties totally ignorant of, and not responsible for, the personal crimes of another. It is truly said the defendants will benefit by the crime of their ancestor, if committed, and yet it is not from that solely, but also from the neglect of plaintiffs or their ancestors to urge their demand when they might properly have invoked this rule of evidence. They should not profit by their own fault, nor be exempt from the consequences of their ancestors' fault, any more than the defendants from that of their ancestors. To apply this rule in this case would make titles to property derived from testaments most precarious.

The law has provided for the transmission of property at the death of the owner, but has given to the owner the right to modify and change this order under certain fixed conditions, a compliance with which is essential. When the prescribed conditions and forms are shown plainly to have been observed, and rights of property are vested and enjoyed for a series of years under them, something more than suspicion, inference, surmise or presumption, drawn from a fragmentary family correspondence, covering many years, is required to overturn what has been done apparently in strict conformity with law, and has regularly received the sanction of the appropriate tribunal of justice. We do not pretend to imply that a will, made in legal form and executed under an order of court, may not be set aside. But we do say that when, as in this case, the attempt is made after a lapse of nearly a third of a century, and the immediate actors have passed away, the parties who make it and do not show surprise, recent discoveries of their rights, or some good cause for such delay, must be held to the strictest proofs.

The plaintiffs have not cited any authority in our State, where the formalities of an olographic will have been established under the

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maxim as invoked here, and we have been unable to find any. Some French and English works are quoted with much confidence as supporting such a doctrine, but it is well to bear in mind that the law, in Louisiana, in relation to the form and proof of olographic wills, differs in some important respects from the law on the same subject in the countries referred to. An examination, however, of those cited shows them to be actions against the immediate legatees or devisees, and in cases where they were called on by due process, and had been shown to have committed suppression, mutilation or destruction. The cases most analagous are reported in Dalloz' *Jurisprudence Generale*, and in them the parties held liable had been proceeded against *correctively* [criminally], and found guilty of having mutilated, concealed or destroyed *second* wills, by which the first, under which they held, were revoked or supplemented, and the courts decided that the principle, on which the maxim invoked herein is founded, should apply. Without expressing concurrence or dissent as to the reasoning and decisions in those cases, we need only remark that the law and facts thereof do not apply to this. As the rule does not apply, we can not say the defendants are not permitted to object, that it is not shown that the instrument was in due form, and to require direct proof thereof, which proof has not been furnished.

But, admitting it to be entirely written, dated and signed by James H. Shepherd, it is not shown to have contained testamentary dispositions of the testator's property, in the sense of the law defining testaments, and should not, consequently, be admitted to probate and execution as his will, and, as a matter of course, it can have no effect whatever for any purpose unless probated and ordered to be executed. C. C. 1637; 6 An. 105.

All that Rezin has written and said about it must be taken together as evidence, and from it we conclude that the "sealed letter" was not testamentary, or a part of the will of James, but simply a confidential letter to his legatee, containing suggestions and requests, a compliance with which rested in the conscience of the legatee. It is notable that in each of his letters bearing directly on this point, introduced in evidence by the plaintiffs, Rezin emphatically stated that the giving or disposal contemplated was left to his own discretion; and where he uses the words "legacies," "bequests," etc., the context and his conduct show that they were gifts which he himself was to make as owner by universal title under the will, and not legacies left by James. He also states that, in a letter of subsequent date to the one in question, James made some changes in the suggestions contained in the former. All that any of the witnesses have said is derived originally from Rezin, whose statements must control. A testament disposes of the property of the testator, and not of the legatee.

It is evident, also, that James did not consider this document as his will, or any part of it. He very clearly indicated, by the indorsements on the envelops and other respective papers, which was his will and which was not. He distinctly named and marked one a "will," and the other "*a communication to R. D. Shepherd*"—not a codicil to his will, not directions as to carrying out his own dispositions of his estate, but a communication, a letter, sealed and addressed to "R. D. Shepherd, or, in case of his death, Abraham Shepherd." In the will, no reference is made to the letter, and the record does not show it to be anything more than what he intended it—a private letter, lacking the legal requisites of a will, and conferring on third parties no rights that can be enforced by action at law.

It is clear, also, from their conduct, that the family did not consider it a will in their favor, but, at most, a direction or request to Rezin to make *his* will in their favor, and they do not agree as to the manner in which, or the persons in whose favor, it was to be made. Henry Shepherd, the brother, says that after the letters to himself and Lee were received, his mother and brother Abraham always acted and spoke in perfect harmony with the hypothesis that the testamentary disposition made by James H. Shepherd of his estate to R. D. Shepherd was final and conclusive, and no question was ever made, to his knowledge, as to the correctness of the information imparted by Rezin in said letters. One of the brothers, the brother-in-law, and one or two of the friends of the family who have testified, were lawyers, and if the sealed letter was thought to have conferred any legal rights, they certainly could and would have been asserted.

It must be borne in mind that no one is claiming a special legacy or damages for withholding what was devised to one or more. To such a claim the plea of prescription would be successfully opposed. The suit is to establish a certain document of a concurrent date, as a part of the will of James H. Shepherd, which, as described, would, if effectual, make a totally different disposal from, and really revoke, the part acknowledged, probated and executed as a will. This demand, in our opinion, is not sustained by legal proofs. To probate it would be the making, by the court, of a new and different will for the testator from the mere declarations of the parties for whose benefit the will is to be made, not as to what they know, but as to their recollection of what Rezin had told or written to them.

Judgment affirmed.

WYLY, J., *concurring*. Large amounts appear to be involved, and great learning and ability have been displayed by the counsel engaged in this litigation; many difficult questions of law have been discussed

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in the written and oral arguments, especially the doctrine of substitutions, vulgar and *fidei* commissary; but I do not regard these cases as difficult.

A man named Shepherd died in this city in 1837, leaving his olographic will and a sealed letter addressed to his universal legatee; they were both contained in the same package or envelop; the olographic will was duly proved, registered, ordered to be executed, and the universal legatee went regularly into possession of the estate, the sealed letter was delivered to the universal legatee, to whom it was directed, and very soon thereafter the heirs at law of the testator were advised of the contents of the sealed letter by the universal legatee.

The complaints of the heirs at law now are, that this sealed letter, of the contents of which they were advised at least a quarter of a century ago, was a testamentary paper, and was part of the will of the testator, and should have been probated with the olographic will in 1837.

The universal legatee is dead, and his heirs, in answer to the call for the sealed letter, say it was never in their possession, and they have no knowledge concerning it.

This sealed letter has never been probated, and the record does not contain sufficient proof to admit it to probate; it is not shown that this letter, left with his will, was designed by the testator to form a part thereof; it is not shown that the letter was wholly dated, written and signed by the testator; that it instituted an heir, or was intended as a testament. But it is contended that the sealed letter was suppressed by the universal legatee after he received it; that he was a spoliator, and all the presumptions are against him and his heirs. I fully recognize the force of the maxim, but think its application not justified by the facts disclosed in the record of these cases. A letter of such importance, of the contents of which the heirs at law have been advised by the universal legatee for a quarter of a century, and held by him openly for so long a period to their knowledge, without ever a call being made by them for it, or even an intimation that it was a testamentary paper, can not fairly be said to be a suppressed testament at this late day, because the heirs of the universal legatee are not able to produce it. The fact that he so often communicated its contents in his numerous letters to the heirs at law, and held it openly for so many years without any demand for it on their part, or any charge that it was a testamentary paper, convinces me that there was no suppression of a testament in contemplation of law or otherwise.

It is useless to discuss the contents of the sealed letter, whether it was a testamentary paper, involving a *fidei* commissary; substitution or not, because it has not been proved and ordered to be executed. Article 1637, C. C., provides that a testament is without effect until it

is proved and the execution of it is ordered. This principle was recognized in the case of *Stewart's Curator v. Row*, 10 La. 530; also in *Marcus v. Barcas*, 5 An. 265, in which it was held that until a will has been proved, "it can produce no legal effect, and is not admissible in evidence." In the case of the *Heirs of Landry v. Heirs of Duarin*, 5 An. 612, it was held that: "A testament is without effect until it has been duly proved and the execution ordered by competent authority." The same doctrine is affirmed in *Aubert v. Aubert et al.*, 6 An. 104. Whether the sealed letter was a testamentary paper or not, it can have no effect, because it has not been proved, and the records do not contain sufficient evidence to entitle it to probate. The maxim, *omnia præsumentur contra spoliatores*, has no application whatever to the cases before us, as disclosed by the records, there being no suppression of a testament, or a testamentary paper, in contemplation of law.

There being no proof to authorize the probate of any other will, or evidence of the suppression of a testamentary paper as charged, I think the olographic will, probated in 1837, should remain undisturbed, and the title to property, acquired thereunder, more than a quarter of a century ago, should not now be questioned.

I concur in the opinion of the court in these cases.

TALIAFERRO, J., *dissenting*. I dissent from the opinion of the majority of the court for the reason that I believe the "sealed letter" constituted a part of the will of James H. Shepherd and that it was fraudulently concealed and destroyed. I am not satisfied from anything in the record of the case that the letter was merely a memorandum or statement of the wishes of the testator, the compliance with which was contingent upon the will of Rezin D. Shepherd. I conclude from the entire evidence that, in relation to the plaintiff in these cases, the conduct of this man throughout his entire management of the succession of his brother, was disingenuous, evasive, tortuous. It is not clear to my mind he ever disclosed fully and truthfully the purposes expressed by the testator in that letter. He has, however, disclosed enough to satisfy me that that instrument should be taken and construed as part of the will of the testator. The disclosure which he has made shows that the instrument conferred rights upon the plaintiffs. He spoke of it as containing "legacies" and "bequests" made by his brother. Referring to it he said: "This directs that mother shall renounce all claim to the estate, and that Ann shall have only \$5000, Moses nothing, Eliza Lee \$10,000; the residue to be divided amongst his nephews and nieces, double as much to the boys as the girls." He subsequently said in regard to Mrs. Hammond: "I shall see that all her rights shall be taken care of according to the

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wording of the sealed letter. He thought his brother had rather "cut her off" by leaving her only \$5000. "The residue to be divided," etc. The terms and phraseology used clearly import that testamentary dispositions were made by this instrument. He kept the sealed letter strictly to himself and talked about what it contained. When he found that suspicion was aroused in regard to his dealings with those who were interested in the provisions contained in the act, he announced that it should be placed with his own will to stand as a shield to protect him against obloquy and reproach. This pledge he did not redeem. His will was preserved amid the wreck of preceding years, but not the sealed letter. Under this state of facts the terms and expressions used by him in speaking of its contents, when they import rights and benefits conferred upon others, are to be taken in their fullest and broadest sense; and with rigid scrutiny and tardy admission when they indicate advantages to himself. Presumptions are all against him and in favor of the parties claiming rights under the act which was always in possession of, and withheld by, himself.

It is said in behalf of the defendants that the plaintiffs have slept upon their rights; that they should long since have demanded the production of the sealed letter, if they believed it to be a will and to contain important provisions in their favor. By the version given of the sealed letter by R. D. Shepherd, the plaintiffs were to receive nothing, or at least were to wait until his demise for the greater part of what they were to receive; that the request of James H. Shepherd was, that the plaintiffs were to be provided for by Rezin D. Shepherd's will. They waited for this will and got nothing by it. If the plaintiffs have slept upon their rights, their lethargy, it is clear to me, was produced by *placebos* administered by Rezin D. Shepherd. He exercised a controlling influence over them, at times holding out encouraging hopes, and at other times assuming a tone of intimidation and a manner of expression calculated to dampen their expectations. He had their confidence, and they trusted to his faith and fair dealing.

The efforts made on the part of the defense to show that the estate of James H. Shepherd was insolvent, I do not regard as successful. There was, doubtless, a large indebtedness, but looking to the circumstances attending it and the means and appliances of the estate, that indebtedness was not so formidable as pretended. It is a significant fact that no record has been shown of the administration by R. D. Shepherd of that large estate; no books or papers presented to show its exact condition and liquidation. It is a matter of history that at the time of the death of James H. Shepherd, 1837, a ruinous revulsion in the financial affairs of this country occurred, the result of an inflated paper currency, which, through an unwise policy, was inaugu-

rated upon the expiration of the last charter of the National Bank, in 1832. Yet, although in the commercial circles many failures occurred, and serious troubles affected the agricultural and manufacturing interests, so great were the recuperative energies of the nation that these difficulties were of short duration. When, by the kind feelings of his wealthy and philanthropic friend, Mr. Touro, money was promptly advanced in large amounts to discharge the pressing debts of James H. Shepherd, and enable the administrator to pass the crisis in safety, only ordinary business capacities were required to retrieve the estate from its embarrassments. These facts were known to Mr. Touro or else he would hardly have been so liberal. He knew he was lending money on good security, and doubtless he received every dollar of it back. That Rezin D. Shepherd did use energy and skill in marshaling the resources of the estate and directing them with judgment, and that he did advance freely money of his own in aid of his brother's estate, and that the estate owed him, there can be no doubt; but I am slow to believe that all his labors and sacrifices in that direction entitled him to gulp this immense property for his pains. He said he was constituted universal legatee of his brother's estate by way of security for a heavy debt his brother owed him. Without adverting to the novelty of this kind of security, it may be remarked that, if such were the case, it must be presumed in the absence of any account or exhibit of his management of the estate, that this heavy debt, as well as all other debts of the estate, was finally paid out of the resources, revenues and means of the estate. After a pretty careful examination of this part of the controversy, I am of the opinion that the counsel for the plaintiffs have rendered ineffectual the efforts on the other side of the question to show an insolvency of the estate, and, as alleged by R. D. Shepherd, to establish the great losses sustained from the failure of its debtors, and that much of the property of the estate would never be worth its appraised value. The large sugar estate called "Golden Grove," yielded a net annual revenue of from \$20,000 to \$25,000; it was cultivated by R. D. Shepherd four years, and was afterward sold for \$250,000. The executors collected \$201,000, and turned over to R. D. Shepherd property appraised, at a time of extreme though temporary depression of value, at \$537,124. At the time R. D. Shepherd received the estate the debts against it amounted to \$324,221

That a will may be written upon as many pieces of paper as a testator may choose, I think will not be denied. That the sealed letter was no will or part of a will because it was not probated, can not be maintained in face of the damaging fact that R. D. Shepherd, or his heirs having it in their own possession, have put it forever out of the power of the plaintiffs to present it for probate. The existence

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of the instrument is proved; its destruction or loss by the act of R. D. Shepherd or his heirs is clearly established; its detention by R. D. Shepherd is a badge of fraud; the foundation is established for proving its contents; the character of its contents is sufficiently shown to constitute it a part of the will of James H. Shepherd, and it should so be taken in connection with the act with which it was found in the same envelop. As to whether the will be null on account of its containing a substitution or *fidei commissum*, I think would be an ulterior question, and I decline to consider it. I think judgment should be rendered in favor of plaintiffs.

Rehearing refused.

No. 2312.—C. M. SHEPHERD et als. v. ELLEN BROOKS et als.

A *fidei commissum* is prohibited, even in favor of parties capable of receiving. The interposition of parties in a testament without interest is a *fidei commissum* within the prohibition, and such interposition, being made in fraud of the law, may be proved *dehors* the will. But the proof must show not only the intention of the testator to create a trust, but it must show, also, that the interposed person was aware of, or that he has discovered such intention, and that he has executed, or intends to execute, the trust, notwithstanding his discovery of the intention of the testator.

A PPEAL from Second District Court, parish of Orleans. *Thomas, J. C. M. Conrad & Son*, for plaintiffs and appellants. *O. Roselius & Alfred Philips and Randall Hunt*, for defendants and appellees.

HOWELL, J. This is an action by other collateral relations of James H. Shepherd, deceased, against the heirs of Rezin D. Shepherd, deceased, and differs from the one just decided in demanding that the will of J. H. Shepherd be declared null, in whole—first, because it contains a substitution in favor of Abraham Shepherd, who was to take under it in case Rezin did not; or, secondly, because, taken in connection with a letter addressed to Rezin, of concurrent date, written, dated and signed by James, and fraudulently suppressed by Rezin, the two constituting the real will, it creates a substitution or a *fidei commissum* in favor of certain of the testator's nephews and nieces; or null so far as it attempts to deprive the testator's mother of her *legitime* and disinherit her without cause.

The same defense was set up in both cases. Both were tried, argued and decided together, on the same evidence, in the court below, and so argued and submitted in this court.

First—As to the first ground of nullity, we think article 1508, C. C., applies. It declares that "the disposition by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir or the legatee does not take, shall not be considered a substitution, and shall be valid."

Second—We have already concluded, in the former case, that the “sealed letter” was not concealed, suppressed or destroyed by Rezin D. Shepherd, and is not satisfactorily shown to have been written, dated and signed by the testator, and, if it were so shown, it is not a part of his will; and consequently it does not, as such, annul the probated will for containing a substitution or *fidei commissum* in favor of the nephews and nieces, as charged in the petition in this suit

But plaintiffs’ counsel, in their argument, abandon the charge of a substitution, and contend that if the will of James H. Shepherd consists solely of the probated paper, the disposition in favor of Rezin D. Shepherd should be set aside as illegal, because the proof is, that it was in trust for the nephews and nieces, which proof may be made by extrinsic evidence of every description.

In their last brief, they say: “Most of the argument, oral and written, of the counsel for defendants, has been devoted to showing that the bequest (taken in connection, of course, with the disposition in favor of the nephews and nieces) does not involve a substitution. In this we agree with them. * * * But as the evidence developed itself, and it became apparent that R. D. Shepherd, according to his own statements, was only nominally heir, with certain limited rights and privileges, but stopping far short of ownership; and that the real beneficiaries were the nephews and nieces of the testator, all doubt as to which of these two tenures, both equally illegal, the disposition belonged, was at an end. Accordingly, the word ‘substitution’ does not once occur in our original brief.”

We may concede that the authorities cited by them establish the proposition that *fidei commissa*, even in favor of parties capable of receiving, are prohibited; that the interposition of parties without interest is a *fidei commissum* within the prohibition, and that such interposition, being in fraud of the law, may be proven *dehors* the will. But the proof must show not only the intention on the part of the testator to create a trust, but also that the interposed person, trustee, instituted heir or legatee was aware of, or discovered, such intention, and has either executed or intends to execute it. Coin Delisle, pp. 58, 59, sections 55. 56; 12 La. 19; 3 R. 441; 2 An. 718; 6 An. 133; 15 An. 157, 600.

M. Coin Delisle, cited above, after stating the question to be an important one, whether in the case of a regular will a secret or verbal trust or prohibited substitution can be proved, and saying that M. Rolland de Villargues and M. Dalloz maintained the negative and M. Merlin the affirmative, and adopting Merlin’s views as the more sound, adds:

“Mais, outre que la preuve, en pareille matière, doit être admise avec précaution, il faut aussi qu’il résulte bien formellement des faits

que le légataire ait consenti à être l'intermédiaire du testateur pour l'exécution d'une substitution prohibée. S'il n'avait été chargé que d'une fiducie ou d'un fidéicommiss indépendant de son décès, la preuve en pourrait être admise. (M. Merlin, lieu cité, Observ. sur l'arrêt du 22 décembre 1814; V. aussi ci-dessus No. 22.) On ne pourrait même être admis à prouver que le donateur avait, en faisant sa libéralité, l'opinion que le légataire la rendrait au tiers, parce que 'l'opinion que peut avoir un donateur de l'emploi probable des objets donnés ne peut jamais être considérée comme une condition, même tacite, apposée à la donation, ni constituer un fidéicommiss.' (Caen, 31 janvier 1827.)"

We may here remark that in *Duplessis v. Kennedy*, 6 La. 247, and *Beaulieu v. Ternoir*, 5 An. 480, it was said: "The entire disposition is null in case of substitution only."

Now, the opinion we have formed from the facts and proofs of this case, does not bring it within the doctrine advanced by plaintiffs. We do not consider it proven that Rezin D. Shepherd was constituted, or believed himself, a trustee to transmit the estate of his brother James to his nephews and nieces. He always claimed to be the actual legatee of all the property, in full, indefeasible right of ownership, and from the first of his possession asserted all the rights of sole, undisputed owner, paying and liquidating debts, executing and canceling mortgages, offering for sale and selling the property, and generally and publicly doing all acts pertaining to ownership, frequently mentioning these things and his intentions concerning them in his correspondence with the members of the family; but admitting that his brother had requested him, in a confidential letter, to do certain things and make certain gifts and dispositions as of his own property, stating at the same time, in which he is sustained by the record, that his brother's estate was greatly involved, and but for the munificent aid of Judah Touro and his own means and credit, the property would not have paid the debts. In support and direct recognition of his ownership, Moses, his brother, and the father of four of the claimants in these suits, jointly with three other parties, in July, 1842, bought from him the Golden Grove plantation and the slaves inherited by him from James, for \$250,000, taking his title. It is true he, at times, used words such as "legacy," "bequest," etc., which ordinarily imply testamentary disposition, and wrote about carrying out the wishes of his brother James, as contained in the sealed letter; but, as said by us in the case of *Lucas v. Brooks*, just decided, all that he has said, written and done in relation to this subject, must be taken and construed together, and, when so taken, there is little difficulty in determining what he meant, and it is evident the family understood it as he did, which accounts for their course of conduct up to the day of his death. After this event. Lee says he advised his children to take no steps until

 Shepherd et als. v. Ellen Brooks et als.

they had time to see whether or not Rezin's representatives had instructions to do what he understood Rezin was to have done in his will. It is true, also, that Abraham Shepherd seems to have construed the probated will and the sealed letter as constituting a trust in favor of his own and Henry's children, when he wrote to Lee, in 1838, but it was only his *opinion*, which must be taken simply as an opinion.

Our conclusion is, that Rezin was the real legatee of his brother James under the will probated in 1837, and we think it unnecessary to go into an examination of the interesting and prolific subject of prohibited substitutions and *fidei commissa*, the distinctions between them, the effect of either upon the whole or a part of a will, and the many authorities upon each side of these questions.

The position that the will is null in so far as it attempts to deprive the mother of her *legitime* and disinherit her without cause, is not sustained in law. Article 1489, C. C., says: "Any disposition of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally dispose, to the prejudice of the forced heirs, is not null, but only reducible to that *quantum*." Plaintiffs' counsel admit that this is not an action of reduction, to which the plea of prescription would apply.

The judge *a quo* did not err in his conclusion.

Judgment affirmed.

Rehearing refused.

No. 2728.—S. B. GRAVES AND HUSBAND v. S. E. HUNTER, assignee of BURBRIDGE & Co.

For the purpose of determining whether a mortgage exists against the judgment debtor, resulting from the recording of a judgment, the judgment itself, as placed upon the record, can alone be consulted. The judgment creditor can not be permitted to introduce or consult the petition or pleadings in the case for the purpose of explaining or showing that the judgment is joint or *in solido*. Therefore, if the judgment, as recorded, shows that it is a joint judgment, and that more than one-half thereof has been paid by one of the joint judgment debtors, no judicial mortgage exists in favor of the judgment creditors, resulting from the recording of such judgment, against the property of the joint judgment debtor who has thus paid. His part of the obligation being extinguished by payment, the judicial mortgage resting on his property falls with it.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. Posey, J. L. M. Pipkins, for plaintiffs and appellees. McVea & Hunter, Kernan & Lyons and Race, Foster & E. T. Merrick, for defendants and appellants.

TALIAFERRO, J. This case presents a contest for priority of mortgage. Burbridge & Co. obtained a judgment in the Fourth District Court of New Orleans on the twenty-fourth of March, 1858, against Thomas Bisland and Micajah Harris for \$21,961 43, with eight per cent. interest from nineteenth of March, 1858. This judgment was recorded in the parish of East Feliciana on the third of April, 1858.

S. B. Graves and Husband v. Hunter, assignee of Burbridge & Co

S. B. Graves obtained a judgment *in solido* against F. Hardesty and Micajah Harris on the eleventh of February, 1867, for \$4558 50, with interest from thirteenth of October, 1863. This judgment was recorded in the parish of East Feliciana on the twenty-sixth February, 1867.

The judgment of Burbridge & Co. decrees that plaintiffs "recover of said defendants, Thomas A. Bisland and Micajah Harris, the sum of twenty-one thousand nine hundred and sixty-one dollars and forty-three cents," etc. This judgment had upon it at the time it was recorded in East Feliciana two credits, one for \$10,075, and the other for \$5000; both payments having been made by Micajah Harris, one of the defendants. Property of this defendant having been seized under *fiери facias*, issued on the judgment of Burbridge & Co., S. B. Graves came in by third opposition, claiming to have her judgment paid first out of the proceeds of the property to be sold, averring that the seizing party has no judicial mortgage against the property of Micajah Harris, as the judgment recorded by Burbridge & Co. shows that it is against judgment, and that Harris has paid his part of it. In the court below the opponent had judgment in her favor, according to her a priority of mortgage and decreeing a distribution of the property in conformity with the judgment. The seizing creditor and defendant in opposition has appealed.

A bill of exception was taken, on the part of the opponent, to the admission in evidence of the record of the suit in which Burbridge & Co. obtained in the Fourth District Court the judgment, a copy of which they caused to be recorded in the parish of East Feliciana to operate a judicial mortgage against the property of their debtors. The admissibility of this evidence involves the main question in this case. The object of introducing it was to show from the pleadings, from the entire record taken together, that the judgment rendered is a judgment *in solido*, and therefore that the recording of it preserves against the property of the seized debtor, Harris, a judicial mortgage for the unpaid balance of the judgment. The defendant insists that the judgment *per se* and the credits indorsed upon it show it to be a judgment *in solido*; that such is the import of its terms, and that the payments made by Harris, exceeding one-half its amount, show that he was bound for more than one-half of its amount. The opponent contends that the judgment recorded to operate as a judicial mortgage must speak for itself; that extraneous evidence, as against third parties, can not be resorted to to give the act any other meaning than that in which it presents itself upon the records of the parish of East Feliciana.

We think the exception should have been sustained. The object of recording is notice to the world of the subject matter contained in the instrument recorded. Third persons, it has been frequently deter-

mined by this court, are not required to look beyond the registry. Although judgments are interpreted by the pleadings and nature of the obligation sued on; yet we apprehend that, when they are placed upon the public records to serve the purpose of judicial mortgages, they are to be interpreted only as they stand recorded in the mortgage book, as provided by law. If third parties were required to go to the courts where judgments were rendered and inspect the pleadings and nature of each case in order to determine the true character and extent of the judgment recorded to operate as a judicial mortgage, a deplorable state of things would exist, and such as surely was never intended. And the rights of individuals would be rendered insecure and precarious in the extreme if recorded instruments, having a meaning accepted and understood by the world, should at a subsequent period by resort, had to other instruments, be given an entirely different meaning. Mortgages can not be extended by implication. They are construed strictly. In the construction of instruments which are placed upon the records of the country and to be obligatory upon third parties as to what they express and are intended to make known, their language should be clear, explicit, unambiguous, and their purport free from doubt. Nothing is left to inference or deduction. In the case before us the recorded instrument informs the world that at a certain time a judgment for a certain sum of money was rendered against Thomas Bisland and Micajah Harris. Presumption is not resorted to to determine whether the judgment is joint or *in solido*. The language used certainly does not denote that it was rendered *in solido*. "Solidarity in obligations is not presumed. It must be expressly stipulated." C. C., art. 2088. The next article declares that "this rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provision of law." What provision of law is apparent on the face of these recorded instruments, that constitutes the judgment a solidary judgment? Looked to as recorded, it must therefore be taken as a judgment rendered jointly against the parties. The amount paid by Harris exceeds one-half the amount of the judgment and shows that at the time the judgment was recorded in East Feliciana Harris had paid his half of it. There is no room to infer that the judgment was *in solido*, because the sum paid by Harris exceeds one-half its amount. It is not certain that he was bound for the whole, because he paid more than one-half of the whole. But as the greater includes the less, it is certain that he paid half of it. Whatever was intended by those who recorded the judgment and the receipts and releases that were made upon it, these acts do not inform the public that there subsists a judicial mortgage against the property of Harris. Upon their face they show the contrary. Viewing the subject in this light, we think the judgment rendered by the court *a qua* correct.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs. 5 N. S. 112; 7 An. 533.

No. 2608.—M. C. HALL v. B. R. HALL.

After the tax collector has made out and returned into the proper office the delinquent list, in compliance with law, the title to lands included in such list becomes vested in the State, subject to the right of the parties interested to redeem it as provided by law. After the delinquent list has been thus returned, the authority of the tax collector ceases, and he can not thereafter be made a party, nor is he competent to represent the State in a suit or proceeding by the vendor against the purchaser to compel a settlement of the taxes due on lands.

A PPEAL from Fifth District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellant. *A. & E. B. Talbot*, for defendant and appellee.

HOWELL, J. This is an application on the part of the plaintiff and defendant (the latter acting for his minor children) for a rule on D. R. Carroll, the purchaser of certain real property sold in this suit and C. Lozano, the State and parish tax collector, to show cause why said Carroll should not pay over the balance of the price, returned by him for the purpose of paying the taxes of 1862, 1863, 1864, 1866, 1867 and 1868, claimed to be due, and the said property pass to the purchaser "free of all claim or lien of the State of Louisiana or parish of Iberville for any of the taxes aforesaid."

Carroll answers that he holds the said sum to pay such taxes as may be legally due on the property, and whenever it is ascertained contradictorily with the collector what taxes are due, he is ready to pay as may be required.

Lozano excepts :

First—That the attempt of plaintiff to proceed by rule or otherwise, in this case, is prohibited by law.

Second—That the lands referred to by plaintiff, and on which a tax was assessed, have been embraced in the delinquent list of unpaid taxes, and filed in the office of the Recorder of the parish of Iberville, as required by law, and appearer has ceased to have any authority to collect said tax.

The exception alone was tried and sustained, dismissing the rule as to the tax collector, and plaintiffs appealed.

The first ground of the exception, which seems inconsistent with the second, need not be considered, as the latter appears to be well taken, being argued on this point as to the collector's right or authority to represent the State in this proceeding, no distinction being made between the parish and State taxes.

Under the seventy-fourth section of the Revenue Act of 1869, No. 114, the collector made out and returned the delinquent list of unpaid taxes for the years 1867 and 1868, which embraces the property in question, and made oath as required, that he found no other property liable to seizure and sale for said taxes. This, by section seventy-six of said act, vested the title to said property in the State, subject to

the right of the parties interested to redeem it, as provided in other sections of the same act, and such parties must apply for relief where the law has directed them. From the date of this mutation of the title, the authority of the tax collector ceases, and the question as to what taxes are to be paid or may be exacted in relation to, or on account of, that property, must be settled contradictorily with the officer or officers designated by the law for the purpose. The fact that the collector was commissioned to collect the back taxes, does not show authority in him to collect or receive such taxes after the title to the property, alleged to be subject to them, has been vested in the State. He may represent the State in proceedings against individuals for taxes due on their property, but not on property vested in the State. He is not the officer designated by the law to represent the State in such cases. A judgment against the tax collector in this proceeding, as the law now stands, would not bind the State.

Judgment affirmed.

No. 2690.—SUCCESSION OF AMANDA HATCHER.

In a suit of opposition to the administrator's account by the heirs, the names of the heirs must be set forth in the petition.

The authorization of the wife to appear in court, as a party to the suit, must be shown otherwise than by her own averment or that of her attorney, 21 An. 576; therefore, the appeal will be dismissed on motion, if the original petition of opposition to the administrator's account shows that the petitioners, who were married women, have been legally authorized to institute and prosecute neither the suit nor the appeal.

The capacity of a party who appears in court as the representative of another, must be alleged, but it need not be proved unless specially denied.

Therefore, when the petition of opposition to the administrator's account only shows as to one of the opponents, that he was a minor, without averring or designating his tutor or tutrix by name, it is defective, and under this averment the opponent can neither prosecute the suit nor the appeal.

APPEAL from the Parish Court of East Feliciana. *Boedecker*, Parish Judge. *D. J. Wedge* and *J. W. Burgess*, for opponents and appellants. *McVea & Hunter*, for administrator and appellee.

WYLY, J. The motion to dismiss this appeal for want of proper parties must prevail.

It was a suit of opposition to the administrator's account, in which suit the names of the petitioners are not mentioned. It begins as follows: "Succession of A. M. Hatcher. In this matter now come all the heirs of A. M. Hatcher, deceased, as set forth in their original petition herein, and specially oppose each and every item of credits claimed by the administrator in his final account on file," etc.

We find in the record no original petition of all the heirs as averred. There appears, however, the petition for inventory of Eliza Hatcher, herself a married woman, not shown therein to be authorized by her husband. In this petition she mentions the heirs of the deceased.

Succession of Amanda Hatcher.

They all appear to be married women, but one, whose name is not given, and who is described as the minor son of Samuel Hatcher represented by Susan Hatcher.

If this be the original petition to which the opponents refer to show their names, it is quite evident that there is a want of authority for the married women to appear and institute the suit. There is no averment of authorization, and no authorization shown.

It has often been held that the authorization of the husband for his wife to appear in court must be shown otherwise than by her averment or that of her attorney. Succession of Pomeroy, 21 An. 576, and authorities cited. As to the heir whose name was not mentioned, but who was described in this petition of Eliza Hatcher for inventory, as the minor son of Samuel Hatcher, represented by Susan Hatcher, we think he is not properly in court. The name of Susan Hatcher, as tutrix of the minor, does not appear in the petition, nor does it appear in any other paper of the record to which reference was made.

We think the capacity of a party, appearing as a fiduciary, should be at least averred; it need not be proved unless specially denied.

The appeal was granted on motion, and there is nothing to show the authority of the appellants either to institute the suit or prosecute the appeal.

Let the appeal be dismissed at appellants' costs.

No. 3096.—FRANCOIS POCHÉ v. SOSTHENE THERIOT, Sheriff, etc. and
PIERRE LAICHÉ.

Buildings or other improvements, placed upon and attached to the land by a third party, belong to the owner of the soil, C. C. 499; and when constructions have been made by a third person on the lands of another, with his own materials, the owner of the soil has the right to keep them on reimbursement of the value of materials and price of workmanship. C. C. 500. Therefore the sale by the sheriff, under execution, of a house built by a third person on the land of another, at the expense of the owner of the soil, is null and void, and the owner of the soil has the right by injunction to prohibit the purchaser at sheriff's sale from removing the house.

In such a case, the owner of the house is entitled to damages for the illegal seizure and sale of his property.

A PPEAL from the Fourth District Court, parish of St. James. *Beauvais, J. Charles Louque*, for plaintiff and appellant. *Legendre & Poché*, for defendants and appellees.

HOWE, J. The plaintiff instituted this action to enjoin the defendants from disturbing him in the possession of a house, alleged to be his property and situate on his plantation, and to recover damages for its wrongful seizure and sale.

The defendant, Laiché, admitted that the defendant, Theriot, as sheriff, seized and sold the house in dispute in virtue of a writ of *fieri facias*, issued in the suit of Laiché v. Poché, Jr., the son of plaintiff;

denied that the building was, or ever had been, the property of the plaintiff, and averred that it was built on plaintiff's land by the said son, and was his property, and lawfully sold as such, and claimed \$200 damages in reconvention for the use of the same since the injunction. The sheriff justified his seizure and sale by similar averments. There was judgment for defendants dissolving the injunction, recognizing the defendant, Laiché, as owner of the building by purchase at the sheriff's sale, and dismissing the reconventional demand; and the plaintiff appealed.

It was admitted on the trial that the land on which the building was erected belonged to plaintiff; and the latter testified in regard to the matter as follows:

"The materials were furnished by me, but my son was employed in the construction of the house. I had the house built for my son's use, but the house belongs to me. My son paid the carpenter \$200, and I returned the money to him. I never retained the amount of \$200 from my son when I settled with him for the amount due him as my minor child. He borrowed the \$200 from Mr. Trepagnier and I gave my son the \$200 for the purpose of reimbursing Mr. Trepagnier, to whom he had given his note. I furnished the bricks; I furnished the lumber also. I paid for the lime and everything else. I had my slaves working on the house when necessary."

In addition to this, we have the presumption established by art. 498 C. C., that all constructions made on the soil are done by the owner and at his expense and belong to him, unless the contrary be proved; and the further provisions that if the owner of the soil has made constructions with materials that did not belong to him, he has a right to keep the same on condition of reimbursing their value to the owner of such materials, C. C., 499; and that when constructions have been made by a third person and with such person's materials, the owner of the soil has a right to keep them upon reimbursement of the value of materials and price of workmanship. C. C. 500. See also *Inst. De Rerum Divisione*, 2, 1, 29 and 30; C. N. 552, 555; Pothier, *Du Droit de Propriété*, 170, 178.

The plaintiff's case is included in these provisions, and we are satisfied that the house belongs to him. The testimony for the defense is not inconsistent with this conclusion nor with the statements of plaintiff on the witness stand. The evidence, as a whole, goes to show that the building was erected to be occupied by the son with his family but on the land of the father, by the labor in part of his servants and with materials either belonging to him or afterwards paid for by him.

The defendants urge that the plaintiff can not be heard to say that the house is his, because he stood by and allowed it to be sold without objection. The record, however, does not seem to sustain this view.

Poche v. Theriot, Sheriff, etc. and Laiche.

It does not appear as matter of fact that the plaintiff did stand by and allow the sale to go on without objection. The injunction was obtained when the defendant Laiché was about to remove the building from plaintiff's land, after having bid it in under his judgment against Poché, Jr. The father may have been absent at the time of sale. It is not shown that he was present. The acquiescence which would prevent a party from claiming his immovable property, ought to be very clearly shown.

We think the judgment should be reversed, and that the plaintiff should recover damages which we fix at \$100.

It is therefore ordered that the judgment appealed from be reversed; that the injunction be perpetuated; and that the plaintiff have judgment against defendants *in solido* for one hundred dollars, with costs of both courts.

No. 2865.—STATE ex rel. ELIAS GEORGE v. ALPHEUS G. TUCKER.

Article sixty-one of the Constitution commands the Governor to fill all vacancies that may occur during the recess of the Senate, by granting commissions, which shall expire at the end of the next regular session thereof.

Article one hundred and twenty vests the General Assembly with power to determine the mode of filling vacancies in all offices for which provision is not made in the Constitution.

By the act of the General Assembly of sixth of March, 1869, the parish of Tangipahoa was created, and the Governor directed to appoint the various officers named in the act. The commission granted to the Recorder stated that he should continue in office until the next general election for such office.

At the next regular session of the Senate another party was appointed Recorder by the Governor, and confirmed by the Senate. The first appointee refused to surrender the office. Suit was brought under the intrusion act of 1868, No. 156, to test the right to the office under their respective commissions. The first appointee claimed that the office being created by the act under which he was appointed, no confirmation by the Senate was necessary, and that he was entitled to hold it until the time fixed by law for an election.

Held—That the Legislature having in the act No. 27, of 1868, established a general system of appointment and confirmation, and the act under which the Recorder of Mortgages of the parish of Tangipahoa was first appointed, not being in conflict therewith, the court would presume that the latter act was passed with reference to the general law on the subject.

Held, further—That in as much as the latter act was in no wise in conflict but was in harmony with the general law, the officer first appointed could only hold until the end of the next regular session of the Senate; therefore, the latter appointee, who was confirmed, is entitled to the office.

APPEAL from the District Court, parish of Tangipahoa. *Ellis, J. Bolivar Edwards*, District Attorney, for appellant. *Emmet D. Craig*, for relator, appellant. *William Duncan* and *R. H. Marr*, for defendant and appellee.

Howe, J. The motion to dismiss has been waived.

This action was instituted under the provisions of the act of the Legislature (No. 156) of 1868, to test the right to the office of Recorder of Mortgages of the parish of Tangipahoa.

The parish was created by act of March 6, 1869, which provides that within ten days after it should become a law, the Governor should appoint and commission for said parish a Recorder and certain other

State ex rel. George v. Tucker.

officials, and that the officers thus appointed and commissioned should continue in office until the election and qualification of their successors at the next general election in the State for such officers.

Under this law the defendant, Tucker, was appointed and commissioned Recorder March 13, 1869. He was not, however, confirmed by the Senate at the next session. In March, 1870, the plaintiff, George, was appointed and confirmed by the Senate, and commissioned.

The judge below decided the controversy in favor of the defendant, on the ground that the special provisions of the act creating the parish above referred to, entitled him to hold the office until the next general election, (which had not at the time of the decision taken place), and that no confirmation by the Senate was necessary under the terms of this particular law.

The relator, who has appealed, contends that on the thirteenth March, 1869, the day the defendant was appointed, there was an original vacancy existing in virtue of the creation of the office by the act establishing the parish; that the provisions of this act in respect of appointments must be construed with, and controlled by, those of the act of August 19, 1868, (No. 27), passed in compliance with article 120 of the Constitution and entitled "An Act to determine the mode of filling vacancies in all offices for which provision is not made in the Constitution;" and that, in as much as by this general act a confirmation by the Senate is necessary, the appointment of the defendant was provisional, merely, and not being confirmed fell to the ground; and that therefore the plaintiff, appointed, confirmed and commissioned to fill this latter vacancy, must have the office.

The views thus urged by plaintiff appear to us to be the more correct. The act of 1868, No. 27, establishes a general system of appointment and confirmation, which is in harmony with that provided in the Constitution, in respect of offices especially named in that instrument. We will not presume that the Legislature meant to disturb this system in this special case, unless an intention so to do be apparent in the provisions of the act under which the parties hereto were appointed. Such intention is not apparent. The latter act does not in words repeal or modify the former, nor does it do so by implication, since it is not inconsistent with it.

It is admitted that the plaintiff's claim for damages should be dismissed as in case of nonsuit.

It is therefore ordered that the judgment appealed from be avoided and reversed, that the defendant, Alpheus Tucker, be excluded from the office of Recorder of the parish of Tangipahoa; that the plaintiff be placed in possession of the said office, and quieted therein; that his claim for damages be dismissed as of nonsuit, and that the defendant pay the costs of both courts.

Rehearing refused.

No. 3125.—CITIZENS' BANK v. L. GRAND & CO. et als.

The Citizens' Bank became the owner of a plantation by purchase at Marshal's sale. The deed of the Marshal conveyed so much land, together with all the buildings and improvements, stock, cattle, carts, mules, etc.

Twelve mules were afterwards seized on the plantation by the sheriff, under a *feri facias*, at the suit of L. Grand & Co. v. J. C. Patrick, as the property of the judgment debtor. J. C. Patrick was, at the time of the Marshal's sale and afterwards, the manager on the place. The bank enjoined the seizure on the ground that the mules seized were attached to the plantation at the time of the sale, and passed to it with the place by purchase.

Held—That, under this state of facts, the burden of showing that the mules, seized as the property of Patrick, were attached to the plantation and passed with the sale thereof as a part of the realty, devolved upon the bank, failing in which the injunction must be dissolved.

A PPEAL from the Seventh District Court, parish of Pointe Coupée.
Miller, J. Farrar & Montgomery, for plaintiff and appellant.
Thomas H. Hewes, for defendants and appellees.

HOWE, J. The defendants seized certain mules as the property of their judgment debtor, J. C. Patrick, and the plaintiff enjoined on the ground that the mules were its property, having been attached as immovables by destination to the Normandy plantation, and as such purchased with the plantation at Marshal's sale by the plaintiff.

There was judgment in favor of defendants, and plaintiff has appealed.

The plaintiff has not established its case. We gather from the evidence, as a whole, that the mules were never attached to the plantation by the owner for its culture, but were purchased and put on the place by J. C. Patrick, a lessee of the place; that they were not, therefore, covered by the mortgage under which the Citizens' Bank purchased; that they were not seized as immovables by the Marshal, and were not by him sold to the bank as a part of the plantation.

The plaintiff asks our attention to a bill of exceptions reserved by it to the refusal of the judge below to permit its counsel to question J. C. Patrick on his direct examination as to the share he had inherited from his father's succession. The plaintiff's object, as stated, was to show that Patrick had no means to purchase the mules. The defendants objected that the plaintiff could not impeach its own witness, and if the testimony was not impeaching, it was irrelevant. We do not think the point of any practical importance at this time. If the question had been allowed, and Patrick had testified that he received nothing from his father's succession, our views of the case would not be changed. He had credit, if he had no property; for we find him owing the defendants, L. Grand & Co., upwards of \$5000, which their counsel, without contradiction, asserts they advanced to him in aid of his planting operations.

The other points made by appellant do not seem to have weight.
Judgment affirmed.

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48 1018.

No. 3223.—THE STATE v. WILLIAM WELSH and HENRY FAGAN.

In a criminal case no appeal lies, except where the accused has been sentenced with the punishment of death or imprisonment at hard labor, or condemned to pay a fine of three hundred dollars. Constitution, art. 74. Therefore an appeal will not lie, on behalf of the State, from an order of the court granting a new trial and continuing the case.

APPEAL from the Ninth District Court, parish of Natchitoches. *Osborn, J. N. A. Robertson*, District Attorney, for the State. *Pierson & Levy*, for defendants and appellees.

HOWE, J. The defendants were indicted for murder and found guilty of manslaughter. A motion for a new trial was made on their behalf and was granted. From the order granting the new trial and continuing the case the State has appealed to this court. The appeal must be dismissed. Under the constitution of 1868, no appeal lies to this court in criminal cases, except when a sentence of a certain severity has been actually imposed. Art. 74.

Appeal dismissed

No. 3156.—LUCIEN P. NORMAND v. FIELDING EDWARDS, etc.

In a suit on an open account the plea of compensation and reconvention by the defendant admits its correctness, and the testimony of the plaintiff, given on the trial, in answer to a question on cross-examination, can not, of itself, be so construed as to change its character from that of an ordinary suit for debt to an action *ex delicto*.

APPEAL from the Seventh District Court, parish of Avoyelles. *Miller, J. Irion & Overton*, for plaintiff and appellee. *Waddill & Barbin*, for defendant and appellant.

HOWE, J. This suit was instituted against the defendant, in his own right and as testamentary executor of his deceased wife, to enforce the payment of \$899 65, alleged to be due by defendant on open account. The defendant pleaded the general issue and set up a claim of \$1520 80 in compensation and asked also for a judgment for that amount in reconvention.

The court below gave judgment in favor of plaintiff for \$605 46, with interest from twenty-seventh September, 1869, and the defendant has appealed.

The plaintiff asks that the judgment be amended in his favor by decreeing interest from July 1, 1867. The defendant files in this court the plea of prescription of one year.

The plea of prescription is untenable. It is founded on the theory that the action is one *ex delicto*, and this theory is, in turn, based on the statement by plaintiff, in his testimony, "that the defendant took his cotton without his authorization; that the defendant took it from Marksville, where it was, to New Orleans and sold it for thirty-six cents per pound," which proceeds constitute the principal item of the

Normand v, Edwards, etc.

account sued on. This remark of plaintiff on cross-examination does not, in itself, especially when contrasted with the pleadings and the other testimony in the case, transform the action into one *ex delicto*. The suit is upon an account; the plea in compensation admits its substantial correctness; the plea in reconvention seeks to strike a balance in favor of defendant; and the testimony quoted at most would only go to show that the defendant, at the inception of the business, was a *negotiorum gestor*, whose acts were afterwards ratified by the plaintiff, who demanded the proceeds of sale less certain outlays and expenses.

We think the plaintiff entitled to interest from July 1, 1867.

It is therefore ordered that the judgment appealed from be amended by decreeing legal interest from July 1, 1867, and that, thus amended, it be affirmed.

No. 2033.—C. YALE, JR., & CO. v. STEVENSON & MAY and E. MARQUEZE & CO.

To maintain a suit of sequestration of a lot of cotton or the proceeds thereof, on the ground of alleged ownership, it devolves on the party claiming to show a title at the time the sequestration was levied. A muniment of title, either of a negative or positive character, acquired subsequent to the sequestration, will not be admitted to bolster up a defective title or supply the want of title at the time the sequestration was levied.

APPEAL from the Seventh District Court, parish of Orleans.
Collens, J. Semmes & Mott, for plaintiffs and appellants. *A. & M. Voorhies*, for defendants and appellees.

WILY, J. The plaintiffs have' appealed from the judgment dismissing their sequestration and rejecting their demand for the proceeds of thirty bales of cotton, shipped from Jefferson, Texas, by Wright, Harrison & Co., on the order of W. McMasters to Stephenson & May, cotton factors of this city, for account of E. Marqueze & Co.

Stephenson & May, having paid over the proceeds of the cotton to the sheriff, were released by agreement of the parties from further responsibility on account thereof, and have no further interest in this litigation.

The proceeds in the hands of the sheriff were subsequently released on bond to the defendants in sequestration, E. Marqueze & Co.

The petition filed December 26, 1865, alleges that the plaintiffs heretofore had and owned a lot of cotton which was on storage at Jefferson, Texas, in the hands of J. M. & J. C. Murphy; that afterward, to wit, on or about the fourth of October, 1865, thirty bales of said cotton, valued at \$6000, the property of plaintiffs, were shipped to Stephenson & May, a commercial firm residing in the city of New Orleans, with instructions to pay the proceeds over to E. Marqueze & Co.; that said cotton was so shipped without their knowledge or con-

sent, and has been sold, and that said consignees refuse to deliver to them the proceeds. On these averments they prayed for a sequestration and to be decreed the owners of the proceeds.

It appears that there was a large amount of cotton belonging to various parties, stored in the warehouse of J. M. & J. C. Murphy, at Jefferson, Texas, during the war; that the cotton in dispute was seized by the United States authorities as the property of the Confederate States, and was turned over to the warehouse keepers, Wright, Harrison & Co., for account of W. McMasters by J. C. Murphy, on following order, to wit: "Headquarters United States Forces, the Special Order No. 3, Post Jefferson, September 7, 1865. Mr. J. C. Murphy will turn over to W. McMasters thirty-three bales of cotton, seized as the property of the so-called Confederate States, it having been released by the proper officer of the United States Treasury Department.

J. B. JONES, Captain Commanding."

The cotton thus passed out of the possession of J. M. & J. C. Murphy, with whom the plaintiffs claim to have had cotton in storage, into the possession of W. McMasters, who appears to have been a member of the firm of E. Marqueze & Co., or to have acted in reference to this cotton as their agent.

E. Marqueze & Co. were therefore in possession through their consignees, at the time the sequestration was levied. It therefore devolves on the plaintiffs to recover on the strength of their own title.

A careful examination of the evidence satisfies us that the plaintiffs have failed to prove their ownership of the cotton, the proceeds of which they have sequestered. They have utterly failed to identify the cotton as their property.

But, in order to strengthen their claim to the cotton, the plaintiffs offered in evidence the following instrument, to wit:

<p>"C. Yale, Jr., & Co., v. E. Marqueze & Co. and Stephenson & May.</p>	}	Third District Court, No. 20,401
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We, the undersigned, abandon and transfer to the plaintiffs, C. Yale, Jr., & Co., in the above suit, all our right, title and interest to the thirty bales of cotton involved in this suit and to the proceeds thereof.

WHEELER, GEIGER & CO.

DARCY & WHEELER.

FOLGER & CO.

SLARK, STAUFFER & CO.

PAYAN & CARHART, In Liquidation

WILLIAM C. THOMPSON & CO.

J. L. HERWIG, Agent for Widow S. Nogues."

The above act of abandonment was not dated, but it was admitted

Yale, Jr., & Co. v. Stevenson & May and Marqueze & Co.

to have been executed only six or eight months previous to the trial, to wit: seventeenth December, 1868.

This act does not benefit the plaintiffs, even admitting that the parties signing it also had cotton stored in the warehouse of J. M. & J. C. Murphy, at Jefferson, Texas, during the war, and probably this may be some of their cotton. The plaintiffs asserted title, December 26, 1865; they declared on that title and on the strength thereof sequestered the proceeds of the cotton involved in this suit. They must recover, if at all, on the title they declared on, and under which they sequestered the proceeds and summoned the defendants to trial.

They will not be permitted to strengthen their sequestration on a title acquired three years after their suit was instituted.

If they had no title whatever to the property in dispute at the time of instituting the suit, their sequestration was wrongfully obtained and their action on that ground must fail. We think the judgment of the court below in favor of the defendants is correct.

Judgment affirmed.

No. 3133.—L. DUPRE v. THOMAS B. HELM—G. P. SMITH, Warrantor.

In a petitory action for a tract of land, if the plaintiff shows a title translativo of property, and the defendant shows none, the plaintiff will recover. In such a case, if the defendant and his warrantor are both appellees, no amendment of the judgment (as between them) can be made by the appellate court, but the rights of the defendant against his warrantor will be reserved in the decree awarding the land to the plaintiff.

APPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. T. C. Manning*, for plaintiff and appellant. *R. A. Hunter*, for defendant and appellee. *M. Ryan*, for warrantor, appellee.

Howe, J. This is a petitory action for a tract of land in Rapides parish, the nineteenth section of township one, south, range two, east, southwestern district of Louisiana. There is no dispute about the facts. The plaintiff bought from the State this nineteenth section in 1857 and his patent therefor covers the land in controversy. The defendant claims under a sale of the sixteenth section made by the parish superintendent of public schools. The statement of facts says of the tract: "It was sold as the sixteenth section under the school law and purchased by David Cheney or his heirs, which latter are the present warrantors. The defendant acquired title from the heirs of David Cheney and went into possession on or about the twelfth February, 1855."

It seems clear that the plaintiff ought to recover. The land in dispute is the nineteenth section. The plaintiff purchased it from the State and holds a patent for it. The defendant's vendors had no title

to it, since they got none by their purchase of another (the sixteenth) section from the parish superintendent, and, therefore, the defendant shows no title.

The judgment against the plaintiff must be reversed. The defendant and warrantor being both appellees we can not, as requested, change the judgment as between them, but their respective rights may be reserved.

It is therefore ordered that the judgment appealed from be avoided and reversed. It is further ordered that the plaintiff have judgment against the defendant, recognizing the said plaintiff to be the owner of the following tract of land, situate in the parish of Rapides, viz: the nineteenth section of township one, south, range two, east, in the southwestern district of Louisiana, containing six hundred and thirty-nine 28-100 acres, and that he be put in possession thereof in accordance with law, and that the defendant pay costs. It is further ordered that the claims of the defendant against the warrantor and of the warrantor in reconvention or otherwise against the defendant be reserved. —

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No. 2034.—BALTHAZAR BLANCK v. H. SPECKMAN AND WIFE.

A judgment can not be annulled by direct action for any alleged vice of form in the mode of proceeding. It can only be annulled by such action for one of the three classes of vice of form contained in article 606 of the Code of Practice, viz: First, where the judgment debtor could not stand in judgment; second, where the judgment debtor had not been cited; third, where the court is without jurisdiction *ratione materie*.

Therefore, if the judge *a quo* has rendered judgment on default in a damage suit without the intervention of a jury as required by article 313 of the Code of Practice, such alleged vice of form may be remedied by appeal, but the judgment can not be annulled by direct action.

APPEAL from Seventh District Court, parish of Orleans. *Collens, J. Cotton & Levy*, for plaintiff and appellant. *Richard Shackelford and Fellows & Mills*, for defendants and appellees.

HOWE, J. This action was instituted in 1863 to annul a judgment rendered in 1859. There was judgment in favor of defendants, and the plaintiff has appealed.

The only cause of nullity relied upon by the plaintiff, appellant, is found in the fact that the suit of *Speckman v. Blanck* was an action for damages; that a default was entered, and that this default was confirmed and judgment rendered by the court without the intervention of a jury.

The Code of Practice, under the section "Of Judgment by Default," provides, article 313, that "when, from the nature of the demand, damages are to be assessed, the court will direct a jury to be summoned to find the same in the same manner as if the defendant had

answered, and the court will give their judgment in conformity with the verdict of the jury."

The appellee contends, and so the court below decided, that the omission to call a jury in that case was an irregularity which might have been remedied by appeal, but which can not be urged, after a lapse of nine years, by an action of nullity.

The causes of nullity of a judgment are two-fold: First, those which relate to the method of procedure and are called vices of form; second, those which appertain to the merits of the question tried. The want of citation is an example of the first class; the obtaining of a judgment on forged documents is an example of the second class.

It is evident that the cause urged by the plaintiff, if any cause it be, would fall into the first class, being an alleged vice of form. These vices of form are catalogued in article 606, C. P. They are arranged in four paragraphs, but may be reduced to three classes:

First—Where the judgment debtor could not stand in judgment.

Second—Where the judgment debtor had not been cited; and

Third—Where the court was without jurisdiction *ratione materiæ*.

We do not understand that a judgment may be annulled for any other *vices of form* than those specified in article 606. The language of the article is plain: "The vices of form for which a judgment can be annulled are the following," etc.

It is otherwise with the causes of nullity which appertain to the merits of the question tried. They are referred to in article 607, and it has been often held that the cases specified in this article are merely illustrative and not exclusive; and that a judgment may be annulled upon equitable grounds, in case an appeal would have afforded no remedy, and a real injury would be sustained, and the party had not been guilty of *laches*, and a just defense was alleged and proved. 1 Rob. 523; 3 An. 346; 11 An. 33. And the reason of this distinction is plain. It is easy for the Legislature to say, and they have said in article 606, in what cases a judgment should be annulled for vices of form; while it would be difficult and dangerous to attempt to define and thus to limit the possible cases of error and fraud which might necessitate equitable relief.

The plaintiff's case must, therefore, fail. It is not expressly provided for in article 606, nor is it included in the more flexible article 607. The irregularity of which he complains, is not a fundamental defect, like the want of citation, nor is the judgment radically defective, like that rendered against a minor without the assistance of his tutor, or by a court without jurisdiction *ratione materiæ*. He had an ample remedy by appeal, and there was no error or fraud. 9 La. 79; 9 An. 197; 9 An. 428; 10 An. 641; 14 An. 656.

Judgment affirmed.

No. 3008.—THE STATE v. MERRYMAN CAULFIELD et als.

A juror who has formed an opinion based on common rumor without any prejudice or bias against the accused, is not disqualified from sitting on the trial.

After the accused has been indicted and pleaded not guilty, it is too late to urge his right to a preliminary examination before a committing magistrate.

Questions of fact, as to whether certain witnesses who testified on the trial, had sworn falsely, can not be noticed on appeal. Constitution, art. 74.

The fact that alcoholic liquors were furnished the jury, to be used by them for refreshment, while sitting on a protracted trial, does not vitiate their verdict; nor is this fact of itself good cause for a new trial.

The presence of the sheriff or his deputies in the jury room during the trial is not misconduct, and the sheriff did nothing more than his duty in procuring a change of clothing for the jurors during the trial, which lasted five days.

The deposit of the *venire* with the clerk and posting it up in the clerk's office on the first day of the term are a sufficient compliance with the law requiring it to be filed in the clerk's office on that day.

APPEAL from the Fifth District Court, parish of East Feliciana. Posey, J. M. A. Esteban, District Attorney for the Fifth Judicial District. Kernan & Lyons, for defendant and appellant.

HOWE, J. The defendants were indicted for the crime of murder, found guilty without capital punishment, and sentenced to imprisonment at hard labor for life. They have appealed, and claim a new trial upon the following grounds presented by their bills of exceptions:

First—That after the *venire* of jurors had been exhausted and the bystanders in the courthouse had been summoned as talesmen and their number exhausted, the court ordered the sheriff to summon fifty citizens from the community to act as talesmen. We understand from this that, the jury being yet incomplete, the sheriff was sent out into the town where the court was held to bring in talesmen. We are not referred to any authority to show any error in this course, and the point seems to be abandoned. 14 An. 461.

Second—That two jurors were challenged for cause by the defendants, and the challenges improperly overruled. Each of these two jurors, on their *voir dire*, said, respectively, that he had formed and expressed an opinion, that it was a deliberate and fixed opinion, that it was formed from common rumor, that it would require evidence to remove it from his mind, that circumstantial evidence, if reliable and satisfactory, would remove it, that he had no bias or prejudice against the accused, and that he could render an impartial verdict according to the law and the evidence. Both jurors were challenged peremptorily, and neither sat on the trial of the cause. It does not appear that the defendants, or any of them, by this course exhausted their peremptory challenges. An opinion, based on rumor, where there is no bias or prejudice against the prisoner, does not disqualify; and, moreover, even if there should be reason to think that the challenge for cause should have been maintained, yet where the jurors did not

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sit in the case, and it does not appear that the prisoners' peremptory challenges were exhausted, we should not feel called on to grant a new trial. 14 An. 462.

Third—That the court *a qua* erred in refusing the accused a preliminary examination.

The record shows that the accused were indicted, pleaded not guilty, were tried and found guilty, and this question of a preliminary examination was not suggested until a motion was made for a new trial. If there was anything in the point, it was made too late.

Fourth—That two witnesses who had turned evidence for the State, had sworn falsely. This was urged as a reason for a new trial. The jury and the judge below appear to have believed the witnesses in question, and we have no jurisdiction to receive or reverse their decision of a question of fact. Constitution, art. 74.

Fifth—That intoxicating liquors were furnished to the jury during the trial. It does not appear that any liquors were furnished to the jury after they retired to consider of their verdict. The trial, however, lasted five days, and during this long time the jury were of course not allowed to separate day or night, and were obliged to eat and drink in order to sustain life; and the bill of exceptions states as follows: "Though liquor was given to the jury it was in moderation. None of them were intoxicated at any time. Their confinement was such that several of them were affected with sickness." This statement, signed by the judge, is conclusive upon us as a finding of fact; and though we would be far from encouraging the practice in jurymen of taking an enemy into their mouths to steal away their brains, yet we must recognise the fact that alcohol has its use in case of exhaustion and illness. We know of no rule of law which requires total abstinence from beverages containing alcohol upon the part of every member of a jury during the whole of five days and nights of a trial, when several of them are affected with sickness; and we do not feel called upon to grant a new trial upon this point.

Sixth—That there was misconduct on the part of the sheriff and his deputies in eating with the jury and sleeping in the same room with them and in sending and receiving for them messages in regard to changes of clothing. It, however, appears that the sheriffs did not converse with the jury in regard to the case, and that the jury never conversed with any outside parties on any subject. The presence in the jury room of a sheriff or his deputies is not misconduct. *State v. Summers*, 4 An. 27; and it was decent and necessary to send for and receive changes of clothing during the trial; which, we may remark, was concluded on the first of June.

Seventh—That the *venire* of jurors was not filed in the clerk's office on the first day of the term. The *venire*, it appears, was deposited in the

clerk's office on the first day of the term and posted up in such way that it might be conveniently examined. It further appears that the accused, when arraigned, pleaded not guilty and waived service of a copy of the *venire*. If this point could properly be raised after verdict, we think the deposit and posting up in the clerk's office a sufficient filing, the objection being that the words "filed," etc., were not written on it. "A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file." Bonvier's Law Dict. *File*.

Eighth—That the court erred in allowing Bolivar Green and Henry Terrill, alleged accomplices, to testify. There is no force in this point.

or the reasons given, it is ordered that the judgment appealed from be affirmed with costs.

No. 3050.—Widow L. P. BECNEL, Tutrix, v. MICHEL A. BECNEL.

When one joint owner of a plantation remains on and cultivates a portion of the land not exceeding one-half, the other joint owner who does not choose to occupy the plantation, or any portion thereof, in the absence of a lease or agreement to pay rent, has no right of action against his joint owner who has cultivated a portion of the land for the rent thereof. Nor has the joint owner who cultivated a portion of the land, any right of action or legal demand against his joint owner for improvements or repairs made on the place to aid him in securing his crop.

APPEAL from the Fourth District Court, parish of St. John the Baptist. *Beauvais, J. F. P. Poché*, for plaintiff and appellee. *Cooley & Philips* and *John H. Ilsley*, for defendant and appellant.

WYLY, J. The plaintiff, a co-proprietor of the defendant, sues him for rent of the plantation, owned by them jointly, for the years 1867, 1868 and 1869.

The defendant had entered into no contract of lease but merely concluded to remain on the plantation and cultivate a part of it, less than half, after the plaintiff had determined not to cultivate any part of the land, and had voluntarily moved to another plantation in the neighborhood.

It is not pretended that the defendant dispossessed the plaintiff, or in any manner interfered with the enjoyment of her proprietary interest, or that he cultivated more than an amount equal to his half of the plantation. If, instead of abandoning it, she had remained on the common property, she could not have prevented the defendant from enjoying at least half of it, while she was enjoying the other half. Her abandonment of the thing held in common did not impose an obligation on her co-proprietor also to abandon it; nor did it produce a legal obligation compelling him to pay her rent for using that which he would have had the right to use, had she remained.

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Widow Becnel, Tutrix, v. Becnel.

How the right of action asserted by the plaintiff arose in her favor, we can not imagine. The obligation certainly did not spring from a *quasi* contract. The defendant having merely administered his proprietary interest, without in the least impairing the right of his co-proprietor likewise to use and enjoy hers, can not fairly be said to have undertaken, of his own accord, to manage the affairs of another or to have assumed an agency, thereby contracting the tacit engagement to continue it and to complete it—incurring all the obligations of an express agency. C. C. 2274. The obligation certainly did not spring from either of the other four sources known to the law, from whence all legal obligations arise. And we must, therefore, conclude that the right asserted by the plaintiff is not supported by a legal obligation, and that it can not be enforced.

As to the plea in reconvention set up by the defendant for the value of his labor in cleaning the ditches and the slight repairs to the sugar-house and other constructions necessary for the taking off of his crop, we will remark that there is no merit in it. His co-proprietor is not bound to pay him for the slight improvements made in aid of his crop, and this demand is as shallow and unreal as that of the plaintiff.

The judgment of the court below in favor of the plaintiff and against the defendant for \$5250 and costs of the suit is manifestly erroneous.

It is therefore ordered that the judgment of the court *a qua* be reversed, avoided and annulled; and it is now ordered that there be judgment for the defendant, with costs of both courts.

No. 3119.—STATE ex rel. C. BENE v. THE JUDGE OF THE FOURTH DISTRICT COURT, PARISH OF ORLEANS.

Where it is shown that an interlocutory judgment, dissolving an injunction, may work an irreparable injury, the party plaintiff in injunction is entitled to have it reviewed on appeal. Therefore, if the judge *a quo* refuses an appeal from such interlocutory decree, the Supreme Court will, on application, issue a mandamus, compelling him to grant the appeal and send up the record.

APPPLICATION for a Writ of Mandamus. *J. Duvigneaud*, for relator.
A. Theard, Judge, respondent.

HOWELL, J. The relator instituted suit in the Fourth District Court for the parish of Orleans against her husband for a divorce and claiming \$2300, as paraphernal funds, as well as half the community property, and obtained an injunction prohibiting him from disposing of any property pending the suit also forbidding the recorder of mortgages to record any mortgages against the real estate, the register of conveyances to grant a certificate of non-alienation and the People's Bank of New Orleans to pay to the husband a sum of \$1170 on

State ex rel. Bene v. Judge of the Fourth District Court.

deposit. The defendant in said suit moved to dissolve said injunction on the grounds that it was not authorized and that no bond was furnished. The district judge dissolved the injunction as to the bank, but maintained it as to the other parties. The relator applied for a suspensive appeal from this ruling, which was refused, and she now asks for a mandamus to compel an appeal.

The judgment from which the appeal is sought, is an interlocutory one which may work an irreparable injury to the plaintiff in injunction. The character and value of the property in question, as described in these proceedings, are not such as will, under all circumstances, afford absolute protection independently of this cash. The injunction having been granted and a judgment rendered dissolving it in this respect, the relator is entitled to a revision thereof by appeal, the amount involved being appealable and the possible contingent injury irreparable.

It is therefore ordered that the mandamus herein be made peremptory.

NO. 3054.—THIRD WARD SCHOOL DISTRICT OF NEW ORLEANS v. CITY BOARD OF SCHOOL DIRECTORS. NO. 3055.—VAN NORDEN, Treasurer, etc. v. THOMAS W. CONWAY, State Superintendent. NO. 3056.—THOMAS W. CONWAY, State Superintendent v. THE CITY BOARD OF SCHOOL DIRECTORS. NO. 3057.—VAN NORDEN, Treasurer, etc. v. THOMAS W. CONWAY, State Superintendent.

The assertion of a right to the same thing by another title and in a different capacity by the same parties, in a new suit, can not be construed as an acquiescence in the former judgment. Therefore the appeal which has been taken from the first judgment will not be dismissed on motion, because the same parties have brought another suit for the same thing under another title and in a different capacity.

The act of the General Assembly, approved March 16, 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans," etc., gives to the ward boards of school directors for the city of New Orleans, the primary control and direction of the public schools of the city. The city board of school directors for the city of New Orleans, created by the same act, are subordinate in their powers and functions to those of the ward boards; they are not, therefore, authorized under this act to make contracts with teachers, receive or disburse the school funds belonging to or coming to the city for school purposes, the ward boards alone being vested with this power under the act.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Lacey & Butler*, for relators, appellants. *E. Filleul*, for appellees.

ON THE MOTION TO DISMISS.

TALIAFERRO, J. We are asked to dismiss the appeals in the above entitled causes, on the following allegations:

That the appellants have instituted a new suit in a different capacity and as substituted to the rights and powers of the ward school boards, in which they claim the same things which were the subject matter of

the said four suits now pending on appeal, and that the said new suits and judicial demands are antagonistic and can not be reconciled with the intention of the said appellants to prosecute said appeal; and on further suggesting to the court that the said appellants have voluntarily executed and satisfied and acquiesced in the judgments appealed from by them.

We are at a loss to conceive how the appellants have "executed, ratified and acquiesced in the judgments appealed from by them," because they assert in a new suit a right to the same objects claimed in these cases by another title and "in a different capacity." There is nothing before us which we can take notice of to establish the facts alleged; but, if they were proved, they would not justify the conclusion that the appellants have acquiesced in the judgments, and there is nothing antagonistic with an intention to appeal.

The motion to dismiss is overruled.

ON THE MERITS.

This is a controversy between two sets of functionaries deriving their powers from the same source and holding their offices under the act of the Legislature approved March 16, 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans, and to raise a revenue for that purpose." These contestants are styled "The City Board of School Directors," and "The Ward Boards of School Directors." The contest relates to priority of jurisdiction over the public schools of the city and the right to receive and disburse the school funds apportioned to the city schools. The four cases will all be considered together, as from their general tenor a decision of the question just named will be conclusive of all the issues presented in the four cases. They were in substance so determined by the judgment of the court below, which was in favor of the ward boards. The city board of school directors have appealed.

The first step in the investigation is to inquire, what are the powers and duties of these two orders of school directors; and, first, what is the scope of the powers and the extent of the functions of the city board of school directors?

We find in section fifty-four of the act before recited, that "the city board of school directors shall have all the powers and perform all the duties in reference to the public schools of the city and to the distribution of the school funds thereof, herein conferred upon the parish boards of school directors for other parishes."

What then are the powers and duties conferred upon the parish boards of school directors? They are detailed in section eighteen of the act, and are as follows:

First—To elect from among their number a president, secretary and

treasurer. The treasurer shall give bonds in an amount not less than five thousand dollars, to be approved by the Parish or District Judge and the Recorder of the parish, and a copy thereof to be forwarded to the Superintendent of Public Education, for the faithful performance of his duties under this act. Said bond may, from time to time, be increased by the order of the board or of the District Judge in proportion to the amount of school funds in the hands of the treasurer.

The board shall, from time to time, examine the accounts of the treasurer and settle them.

Second—To appoint for each ward school district in their parish a board of three district school directors. Said board of district school directors shall hold their office for two years from the time of their appointment and until their successors are duly elected or appointed and qualified.

Third—To visit and examine the schools of the several districts of the parish, from time to time, and to meet and advise with the several boards of district school directors as occasion may require.

Fourth—To report to the State Board of Education and to the Superintendent of Public Education all deficiencies in the schools or neglect of duty on the part of the teachers, directors, division superintendents or other officers.

Fifth—To receive from the State tax collector all proceeds of any parish school tax, levied by the police jury in accordance with this law, and to apportion the same among the several ward school districts of their parish in proportion to the number of persons in their district, between the ages of six and twenty-one years.

Sixth—To make such needful by-laws and regulations for their own government, not inconsistent with this law, as they may deem proper. The treasurer of the board shall receive all money on account of the board and pay out the same on warrants signed by the president and countersigned by the secretary, and he shall keep a correct account of all expenses and receipts in books provided for that purpose, which shall always be open for inspection. He shall render a monthly report to the board and an annual report to the division superintendent on or before the tenth day of January.

These then, are the powers and duties of the city board of directors. We next inquire what are the duties and powers of the ward board of directors? Section fifty-seven provides "that each ward board of school directors in the city of New Orleans, shall have the powers and duties and be governed by the regulations herein prescribed for district boards of school directors in other parishes." Here we are again referred to the powers and duties of another class of directors to know what are the powers and duties of the city ward school directors. We turn now to section twenty-two of the act. It

may be well in this place to premise that by the section twenty-two, each police jury ward of the country parishes, is declared to be a school district, and the term, "district board of school directors," is applied to the school directors of each police jury ward. The duties of this class or grade of directors are :

First—To make all contracts, purchases, payments and sales necessary to carry out any vote of the district; *provided*, that before erecting any schoolhouse they shall consult with the Superintendent of Public Education as to the most approved plan of such building.

Second—To admit pupils not belonging to the district, as provided for in section twenty-five of this act, to their schools on such terms as they may agree upon.

Third—To determine the number of schools which shall be established and the length of time each shall be taught, subject to the provisions of section twenty-three of this act.

Fourth—To fix the site of each schoolhouse, taking into consideration the wants and necessities of the people of each portion of the district.

Fifth—To establish graded or union schools whenever they may be necessary; and they may, as occasion requires, select a person who shall have the general supervision of the schools in their districts, subject to rules and regulations of the board.

Sixth—To determine what branches shall be taught in the schools of their districts.

Seventh—To require the secretary and treasurer each to give bond to the district in such penalty and with such sureties as they may determine upon, conditioned for the faithful performance of their duties under this act. The bond shall be filed with the president of the board, and a copy of the same shall be sent to the Superintendent of Public Education, and in case of breach of condition thereof he shall bring suit thereon in the name of the district.

Eighth—They shall, from time to time, examine the accounts of the treasurer and make settlements with him and present at each regular meeting of the board a full statement of the receipts and expenditures of the district and all matters delegated to them to perform and all such other matters as may be deemed important.

Ninth—To visit the schools in their district, and aid the teachers in establishing and enforcing rules for the government of the schools, and see that they keep a correct list of the pupils, embracing the time during which they attend school, the branches taught and such other matters as may be required by the division superintendent. A majority of the board shall be a quorum to transact business, but a less number may adjourn from time to time. Each district board shall adopt a uniform series of books for all the schools in their district, and such series shall not be changed oftener than once in two years.

Then follow in section twenty-three, the duties prescribed for the officers of these district boards: "The president shall preside in all meetings of the board and of the district; shall draw all drafts on the State Treasurer and upon the treasurer of the parish board for money apportioned to his district; sign all orders on the district treasury, specifying in the order the fund on which they are drawn and the use for which the money is assigned, and he shall sign all contracts. The president shall appear in behalf of his district in all suits brought by or against the same, but, when he is individually a party, this duty shall be performed by the secretary." Next come the various duties of the secretaries, but these it is not necessary for our purpose to bring into view. "The treasurer," it is declared, "shall hold all moneys belonging to the district and pay out the same on the order of the president countersigned by the secretary. He shall receive all money apportioned to the district by the Superintendent of Public Education."

Each parish board of school directors is constituted a body corporate and politic in law, with powers to sue and be sued. The body, it is declared, shall be known and styled "The Board of School Directors for the parish of," etc. In like manner the district board of school directors in the sub-divisions of the parish, that is, in the police jury wards, are each named "Ward District of ———, in the parish of ———, and State of Louisiana." So also each ward board in the city of New Orleans is constituted a body corporate and politic. The city board of school directors, having all the powers of the parish boards may, perhaps, be considered a body corporate, but corporate powers are not conferred upon it in express terms.

We have now in juxta position the several enactments of the Legislature which establish the powers and duties of the litigating parties before the court. With the single exception of sections 61 and 62, to which the order of our investigation will soon bring us, all the enactments are mainly embraced by sections 54 and 57, together with the references therein made, and which we have already referred to.

Before proceeding further, we will take a general retrospect of these enactments. In doing so, we find that the powers given to the city board of directors are few and of a limited character. It appoints for each ward school district three district directors. It is to visit the schools, and to meet and advise with the several boards of ward directors as occasion may require; to report to the State Board of Education and to the Superintendent of Public Education all deficiencies in the schools or neglect of duty on the part of teachers, directors, division superintendents or other officers; to make suitable by-laws for their own government, and to receive from the State tax collector all proceeds of any parish school tax levied by the police jury, and to

apportion the same among the several wards in proportion to the number of persons in each ward between the ages of six and twenty-one years. The character of these grants of power seems to be chiefly supervisory. It would appear that the purpose of the board is more to see that others discharge faithfully the active and important duties required in the administration of the public schools than to participate in those duties itself. When we review the powers and duties conferred upon the ward boards, on the other hand, we see that all the numerous powers and essential duties, necessary to the efficient and practical working of the public school system, are conferred upon them. They are constituted corporate bodies, with ample powers, many, but not all, of which we have previously, in this opinion, reviewed. We shall recur now only to one of these powers or rights, and the one, probably, which constitutes the principal bone of contention, namely, the right to receive and disburse the fifty thousand dollars of State school funds. It is plain that this right is given to the ward boards. To the ward boards *all* the school funds, both State and parochial, go, being apportioned in the one case by the State Superintendent and in the other by the city board of school directors. In any view of these various powers that we can take, the odds seem greatly in favor of the ward boards; indeed, if we remember rightly, the able counsel of the city intimated, on the argument of the case, that if sections 54 and 57 alone were to prevail, the case was against him. He relies upon articles 61 and 62 of the act, taken in connexion with the preceding ones, and aims to harmonize the different sections on the basis of a paramount control of the public schools of New Orleans being given to the city board of school directors by the sections 61 and 62. These sections read thus :

“Section 61. That the control and direction of all public schools within said city, which are supported from public school moneys, whether such moneys are derived from municipal or State taxation, is hereby vested in the board of school directors for the city of New Orleans that shall be appointed under this act, and all laws or parts of laws by which the Common Council of New Orleans is empowered to elect a board of directors of the public schools and by which any control over any of the schools named above is given to said board of directors appointed or elected by the Common Council of New Orleans, and the special act of the General Assembly approved March 14, 1855, entitled ‘An Act relative to public schools in the city of New Orleans,’ be and the same is hereby repealed.”

Taking this section in its entirety, it would seem to explain its purpose to be rather to bring into the new school system an exclusiveness of control over the subject, and to cut off all pretensions that might arise on the part of the City Council to organize public schools, or to

continue such schools as may have been established by previously existing laws, than to confer upon the city board of directors the supremacy that is contended for. And this view, we think, is favored by attending to the provisions of the next section, No. 62, which likewise seem intended to secure, under the new system, the exclusive jurisdiction over the public schools of the city, but not wholly to the city board of school directors. The section 62 is in these words:

“That the sole and exclusive control and regulation of all public schools within the city of New Orleans, whether supported by municipal or State taxation, is hereby vested in the board of school directors for the city of New Orleans and the other subordinate and local boards appointed in said city in accordance with the provisions of this act; and that the offices of all school directors in said city, appointed or elected or assuming to act, are hereby terminated and made to cease, and all the powers hitherto conferred upon such school directors, by virtue of any law or of any ordinance of said city, are hereby abolished and annulled.”

We do not understand the language used in this section to express or imply that the ward boards are subordinate to the city board of school directors. The “sole and exclusive control” is conferred upon the “city board of school directors” *and the other subordinate* and local boards, clearly meaning that the “city board of directors” is itself a subordinate board, all the local boards, of which the city board is one, being subordinate to the State Board and to the State Superintendent. The term “local boards” is used in contradistinction to the general or State Board. By section 5 of the act, the State Board is vested with power “to make all needful rules and regulations for the government of the public schools throughout the State, subject to the provisions of this act.” By section 21, the city board is to report to the State Board and to the State Superintendent. The city board is the creature of the State Board. Section 16.

The ward boards are required to report to the division superintendents and are subject to the control of the State Board and the State Superintendent. Sections 23, 25, 27.

Taking the context of section 62, and in connection with the preceding section, there can be no doubt that its meaning is, that the subordinate and local boards, viz, the city board of school directors and the ward boards shall have sole and exclusive control and regulation of the public schools within the city *as against* the apprehended antagonistic authority over the subject that might be set up by the City Council.

The provisions of sections 61 and 62 are expressed in general terms. By an established rule of construction, a general provision does not repeal a particular one by implication. 3 Martin, 672, and authorities there cited; 14 An. 113; Civil Code, article 23.

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Considering the entire scope of the act, we conclude that it was not the intention of the law-makers to supersede the functions of the ward boards, by vesting in the city board of directors the numerous powers and duties conferred upon the former, nor to give to the city board of directors even a concurrent, and much less a paramount jurisdiction over the various subjects assigned to the ward boards.

It is therefore ordered, adjudged and decreed that the judgments rendered in these several cases by the district court be respectively affirmed, with costs.

LUDELING, C. J., *dissenting*. In all these cases the question presented for decision is, which of two corporations, the city board of school directors or the ward school districts of the city of New Orleans, created by the same statute of the General Assembly, has the paramount power over the public schools in the city of New Orleans and the moneys appropriated for their maintenance?

The appellees contend that section fifty-seven gives the primary and exclusive control to the ward school districts of the city of New Orleans, and that section fifty-four limits the powers of the city board of school directors to such powers as are conferred by the law in parish boards.

If these two sections alone conferred powers on the two corporations and the construction placed upon them by the appellees were correct, there would be little room to doubt as to the powers of each board. But sections fifty-four and fifty-seven are susceptible of a different interpretation, and they are not the only sections of the law bearing on the subject of the powers or rights of the two boards.

Section fifty-four provides "that in the city of New Orleans there shall be a board of school directors of eleven members, who shall hold their offices for two years and until their successors are duly elected or appointed or qualified." It provides how the members of the board shall be appointed and declares that "said board shall have all the powers and perform all the duties in reference to public schools of the city and to the distribution of the school funds thereof herein conferred upon parish boards of school directors for other parishes. Said board shall hold its first meeting within thirty days after its appointment, shall choose a president and treasurer from its own members and shall proceed to appoint, for each ward of the city of New Orleans, a ward board of school directors of five persons."

The clause, "shall have all the powers and perform all the duties in reference to the public schools of the city herein conferred on parish boards for other parishes," does not, in my opinion, necessarily circumscribe the powers and duties of the city board to those appertain-

ing to the parish board. It embraces those powers and duties, but does not exclude others, for it expressly confers the right to distribute the school funds of the city. Section fifty-four does not limit the powers of the city board, nor is the grant of powers therein made exclusive of others.

Section fifty-seven declares that "each ward board of school directors in the city of New Orleans shall have the powers and duties and be governed by the regulations herein prescribed for district boards of school directors in other parishes."

Section twenty-two defines the powers and duties of the directors or district board of school directors.

Section twenty-three defines the duties of district officers.

If the powers and duties granted by section fifty-seven be those only which are enumerated under section twenty-two as those granted to the board in contradistinction to the powers granted to district officers under section twenty-three—a distinction made by the statute itself—there is no antagonism between section fifty-seven and sections sixty-one and sixty-two and seventeen. But, if under section fifty-seven it was intended to give to the ward boards the primary control of the schools in the city, then there would be a palpable antinomy. For sections seventeen, sixty-one and sixty-two vest the right to control and direct all the public schools, within the limits of the city of New Orleans, in the city board of school directors, while fifty-seven would give the same powers to the ward school districts.

It is the duty of courts to give effect to every part of a law, if it be possible to do so. I understand the rule laid down in Bacon's Abridgment, referred to, to mean no more. "If a particular thing be given or limited in a preceding part of a statute, this shall not be altered or taken away by subsequent general words of the same statute." Judge Martin relied upon this rule to maintain a principle announced by the court, "that a general provision does not repeal a particular one by implication." 3 Martin 672.

It is not correct to say that sections sixty-one and sixty-two contain general provisions, because they confer absolute power over the administration of the public schools in New Orleans. They contain specific grants of power, the right to control and direct the public schools.

Article seventeen of the Civil Code declares that "laws upon the same subject matter must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another." Thus, what is clear in this statute may be called in aid to explain what is ambiguous. And article eighteen of the Civil Code directs that, "if the language be ambiguous, we must endeavor to discover the true meaning by considering the spirit and

reason of it." Guided by these rules we may harmonize all the sections of the law. We have already seen that section fifty-four conferred certain rights and imposed certain duties on the city board, but without restricting its powers to those granted in that section.

Section sixty-one gives the control and direction of the public schools in the city of New Orleans to the city board. This section is unambiguous. Control is the synonym of command. Direction is synonymous with control, command. Mr. Webster says: "These words, as here compared, have reference to the exercise of power over the actions of others. Control is negative, denoting power to restrain; command is positive, implying a right to enforce obedience; directions are commands containing instructions how to act. A shipmaster has command of his vessel; he gives directions to the seamen as to the mode of sailing it and exercises a due control over the conduct of the passengers."

The word control is used in sections seventeen, sixty-one and sixty-two in the same sense. In all these sections it means the primary right to govern, or the power to administer the affairs of the public schools. This is manifest from section seventeen. It declares "that the board appointed for the town of Algiers shall control the public schools in the parish of Orleans, not within the city of New Orleans." And it declares further, that, "should any part of said territory be hereafter incorporated within the city of New Orleans, said board shall have control over all territory remaining out of the limits, and the board for the city of New Orleans shall control all schools within the limits of the city of New Orleans." Here it is perfectly clear that the permanent power to administer the affairs of the public schools in the Fifth and Sixth Districts of New Orleans is conferred upon the city board.

To suppose that the General Assembly intended, by sections fifty-four and fifty-seven, to bestow on the ward boards the primary control of the schools in New Orleans in the First, Second, Third and Fourth Districts, when the power had been confirmed on the city board as to the Fifth and Sixth Districts, is to conclude that the law makers intended that the public schools in New Orleans, in different localities, should be subject to two different systems of administration, a policy fraught with evils, and a policy totally at variance with that manifested in section thirty-five in regard to other cities and towns throughout the State.

The jurisdiction of the ward boards is local; they can not establish high schools; and unless the city board have other powers than those given to the parish boards, it can not establish, maintain or govern them; and the most valuable and cherished feature of the public school system of New Orleans will be destroyed. "The letter killeth,

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but the spirit giveth life." I feel authorized in saying that the General Assembly intended to give, and that they did expressly give primary control over the public schools of New Orleans to the city board of school directors. This construction harmonizes every part of an otherwise incongruous law. I therefore dissent from the opinion of the majority in this case.

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108 188

No. 2039.—J. HARVEY, Syndic v. J. P. WALDEN, and his sureties.

In 1862, during the time that the city of New Orleans was under insurgent control and Confederate notes were the circulating medium, a judgment creditor who resided in the city, caused execution to issue, by virtue of which the sheriff seized and sold the property of the debtor. The price of the bid was paid over to the sheriff in Confederate notes, which he deposited in bank. After the city had been captured by the United States, the judgment creditor demanded the amount of the sale in lawful currency.

Held—That Confederate notes being the circulating medium at the time the *fiore facias* was placed in the hands of the sheriff and also at the time the sale was made, and the judgment creditor being at the time a resident of the city of New Orleans, he must be presumed to have authorized the sheriff to take in payment such notes; that the sheriff being obliged to execute the writ, without the power to enforce payment in any other currency than Confederate notes, can not be compelled to return to the creditor any other currency than the notes he received.

When the sheriff has sold property under execution and taken an unlawful currency in payment, the action against the sheriff by the judgment creditor is not for moneys received by him, but for malfeasance in office in having sold property and received in payment thereof other than lawful currency; such action is prescribed by one year. C. C. 3536, (3501).

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. George L. Bright*, for plaintiff and appellant. *William H. Hunt and Fellows & Mills*, for defendants and appellants.

LUDELING, C. J. On the eighteenth day of January, 1862, the plaintiff obtained from the Fourth District Court of New Orleans an order of sale, and placed it in the hands of the sheriff, the defendant, to be executed. Under this writ the sheriff sold property and received the price of the adjudication in Confederate treasury notes, which he deposited in bank.

The plaintiff does not appear to have called for the price until after the capture of New Orleans by the Federal forces, to wit, in August, 1863. It is proven that the defendant was willing and ready at all times after the sale to pay the currency received by him.

This suit was instituted on the eleventh August, 1863, to make the sheriff and his sureties pay in lawful money of the United States the price of the sale aforesaid.

The evidence establishes that Confederate money was the circulating medium at the time the order of sale was placed in the hands of the sheriff and when the sale was made under it. The plaintiff resided in New Orleans, and he must be presumed to have known that no other currency was in general circulation then in January and February, 1862; and we can not resist the conviction that by placing the

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writ in the hands of the sheriff to sell property of his debtor, he authorized him to receive Confederate treasury notes for the price.

We know from the history of the times, that the sheriff could not have demanded with safety any other money in payment of the price of property sold at public auction, and that he could not have enforced the payment of any other kind of money at that time, and still he was obliged to execute the writ. The demand of the plaintiff is without equity.

But, even if the plaintiff's conduct did not authorize the sheriff to receive Confederate treasury notes in payment of the price of the property, it is clear that his right of action against the sheriff is not for moneys received by him, for he received none, but for malfeasance in office in having sold property and received other than lawful money in payment thereof.

If this suit could be regarded as such an action, the plea of prescription of one year, filed in this court, would have to be maintained. C. C. 3536 (3501).

It is therefore ordered that the judgment of the district court be affirmed with costs of appeal.

No. 2928.—F. Z. BARUS v. H. BIDWELL et al.

If the husband be indebted to the wife for paraphernal property belonging to her, which he has received, he may give her in payment for such property other property of his own, and such property so given in payment is not liable to seizure for the debts of the husband, but is to be regarded and treated as her separate property.

A PPEAL from the Fourth District Court for the parish of Orleans. *Theard, J. Righton & McCollum*, for plaintiff and appellee. *E. Filleul*, for defendant and appellant.

WYLY J. The defendant, H. Bidwell, a judgment creditor of the husband of the plaintiff, seized as his property a lot of household furniture and movable effects in a residence on Dauphine street; the sale thereof was enjoined by the plaintiff on the ground that the same belonged to her, having been conveyed to her by her husband in a notarial act of giving in payment in part settlement of a debt for paraphernal funds due her by her said husband.

The court perpetuated the injunction, and the defendant, Bidwell, has appealed. The facts disclosed in the record show a legitimate cause for the transfer from the husband to his wife under article 2421 C. C., it appearing that the former was indebted to the latter on account of paraphernal property in a sum exceeding the value of the property conveyed to her by the act of giving in payment.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 3155.—GEORGE J. KELLER v. MATTHEW VERNON and Wife.

The wife is a competent witness to testify in a suit brought by a creditor of the husband to annul a judgment of separation of property between the husband and wife.

The correctness of a judgment of separation of property may (when attacked by a creditor of the husband) be established by evidence *aliunde*. Therefore, evidence, tending to show that the husband received from the wife funds derived by succession from the estate of one of her deceased relatives prior to her judgment of separation, is admissible to establish the validity of her judgment in a suit by the creditor to annul it.

APPEAL from the Seventh Judicial District, parish of Avoyelles. *Miller, J. A. B. Irion*, for plaintiff and appellee. *Waddill & Barlow and Thomas & Overton*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, having obtained a judgment for a large sum against Matthew Vernon, one of the defendants, who had been his tutor, brought this action against both defendants to annul a judgment of separation of property decreed between them, and by which the plaintiff alleges they seek, collusively and fraudulently, to place beyond his reach the property of his former tutor, which is liable for the tutorship debt.

The wife put in a general denial. She avers the legality of her judgment against the husband, and pleads the prescription of one, two, three, four and five years.

The decree of the lower court annulled the judgment of separation of property and the notarial act of sale subsequently made by the husband, which purported to transfer property to the wife in satisfaction of her paraphernal claims, and recognized in favor of the plaintiff a legal tacit mortgage on certain lands enumerated in the judgment, and ordered the same to be seized and sold in satisfaction of the judgment. The defendant, Mrs. Vernon, prosecutes this appeal.

There are five bills of exceptions in the record. It is important that two of them should be examined at the outset. These relate to the introduction of evidence on the part of the wife to sustain the validity of her claims against her husband. When she presented herself to testify, the objection was raised that the wife can not be a witness for or against her husband. The objection, we think, was improperly sustained by the judge *a quo*. In this case, the contest is between the wife and a creditor who is attacking and seeking to annul her judgment of separation of property previously obtained against her husband. The husband and the wife were joined as defendants, and would seem to have separate interests. We think that, in the case presented, the wife should have been permitted to testify. In the second instance, she offered two witnesses to prove the receipt by her husband of a sum of money constituting paraphernal funds of hers, derived by succession from the estate of one of her deceased relatives. This was objected to on the ground that the judgment of separation of property was a

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consent judgment, and therefore null; that if the wife's claims were well founded, she could not prove them to give vitality and force to the judgment.

It has long been settled that, while the law accords to the creditors of the husband ample scope for contesting the claims of the wife which stand in their way when seeking to enforce their rights against the property of the husband, it also extends to her the equitable right of establishing all *bona fide* claims and privileges awarded to her by law against the estate of her husband. And in cases where, through defective proceedings, her judgment of separation of property proves inoperative, she has the right, when unable to use it as a shield to protect herself, to prove her claims *aliunde*. 14 An. 684; 15 An. 33; 15 An. 81; 17 An. 113.

We think the testimony should have been admitted, and on this ground the case must be remanded.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance to be proceeded with according to law, the plaintiff and appellee paying costs of this appeal.

28	165
117	678

No. 2197.—G. J MORTIMER v. N. H. THOMAS and BENJAMIN M. HARRELL.

In an action in damages for false imprisonment malice will be inferred, if the record shows a want of probable cause for making the arrest. The inexperience of the attorney who advised and instituted the proceedings, while it can not justify the arrest, may properly be invoked in mitigation of the damages to which his client has been subjected.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Randolph, Singleton & Brown*, for plaintiff and appellee. *Race, Foster and E. T. Merrick*, for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment against them for \$1000 damages for the arrest of the plaintiff as a debt due by him to the defendant N. H. Thomas.

There is no doubt that Thomas had a good cause of action against the plaintiff, but there was an utter want of probable cause for the arrest of the latter, a citizen of Mississippi, who was not shown by the oath of his complaining creditor to have absconded from his place of residence. Acts of 1847, pages 63 and 64; Revised Statutes of 1870, sec. 87. We have no doubt that Thomas, the creditor, merely desired to collect the claim due him by the plaintiff; but the utter want of probable cause for the arrest, shown in his petition for arrest, is a sufficient ground for inferring malice. 9 R. 418; 6 An. 577; 9 An. 219.

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He acted under the advice, however, of a young lawyer who instituted the proceedings, whose ignorance of the law, although not justifying the arrest, might to some extent mitigate the damages to which his client should be subjected.

After a careful consideration of the evidence and the circumstances of this case, we have concluded that \$500 dollars will be adequate for the three and a half hours during which the plaintiff was under arrest before he gave bail, and for the detention thereafter of six days at the expiration of which time the writ of arrest was set aside.

It is therefore ordered that the judgment of the court below be reduced to five hundred dollars, and, as thus amended, that it be affirmed.

It is further ordered that the appellee pay costs of the appeal.

No. 3129.—SUCCESSION OF ANTOINE DECUIR, deceased—On Rule by Creditors against the Administratrix. .

To enable a creditor to have an administratrix of a succession removed from office, it must be alleged and shown that the creditor has been injured by the misappropriation or maladministration (by the administratrix) of the property or funds of the succession.

APPEAL from the Parish Court, parish of Pointe Coupée. *Bouanchaud*, Parish Judge. *Thomas J. Cooley* and *F. H. Farrar*, for plaintiffs and appellants. *Haralson & Claiborne*, for administratrix and appellee.

TALIAFERRO, J. This is a proceeding taken by sundry creditors to procure from the Parish Court of Pointe Coupée an order removing from office the administratrix of the succession of Antoine Decuir on the alleged ground of failure to file annual accounts of her administration, and that the sureties on her bond for the administration of the estate are insolvent. In answer to the rule taken the administratrix avers the solvency and sufficiency of her sureties to cover any liabilities that may arise on account of her administration. She admits that she has not filed an account of her administration, but is prepared to do so if allowed a reasonable time. She alleges that the inventory under which she gave bond, is composed principally of landed estate appraised much higher than the present market value thereof; prays that a new inventory and appraisal may be made, and avers her readiness and ability, if required, to furnish satisfactory security for her administration.

The parish judge after hearing the parties and considering the evidence adduced, refused an order destituting her from office, but retained her in office on condition that she furnish sufficient security on her bond and file an account of her administration on or before the fifteenth of December, 1870, the decree being rendered on the third of that month.

Succession of Decuir.

From this judgment the creditors have appealed. There is a mass of evidence showing the insolvency of certain parties, who, it seems, are her bondsmen. The evidence shows, however, that some of them own small amounts of property, and it is not shown that they are insolvent. But we find no sufficient data in the record to enable us to arrive at a satisfactory conclusion that the plaintiffs have made out such a case as entitles them to the stringent order they pray for. They do not allege, much less show that they have been injured by the failure of the defendant to file an account; no mal-administration nor misappropriation of the property or funds of the estate is shown or alleged. There is nothing in the record showing the value of the estate, no copy of the inventory or appraisement is given, and the amount of the bond of the administratrix is not shown. We are not prepared to say the decree of the parish court should be changed.

It is therefore ordered that the judgment of the parish court be affirmed with costs.

No. 3171.—JOHN OSBURN, Under-Tutor *v.* HENRY M. ROGERS, Tutor of the Minor, Mary C. Osburn.

The absence of the under-tutor at a family meeting, convoked for the purpose of recommending the appointment of a tutor, if the evidence shows that he was duly summoned to attend, furnishes no ground for the under-tutor to annul the judgment appointing a tutor under the recommendation of the family meeting.

A PPEAL from the Parish Court, parish of Rapides. *Barlow*, Parish Judge. *William A. Seay*, for under-tutor, appellant. *H. S. Losee*, for tutor, appellee.

WYLY, J. The plaintiff seeks to annul the judgment appointing the defendant tutor of the minor, Mary C. Osburn, on the ground that he, the under-tutor, was not present at the deliberations of the family meeting which advised the appointment.

The court gave judgment for the defendant and the plaintiff has appealed.

The evidence shows that the under-tutor, after neglecting to have a tutor appointed for the minor for fifteen months, refused to attend the family meeting, provoked by the mother of the minor, for the appointment of a tutor, although he was duly summoned to attend the said family meeting.

It is evident from the record that he now seeks to make his own dereliction of duty the ground for annulling the judgment appointing as tutor the defendant, who is the stepfather of the minor. There is no merit in his demand.

Let the judgment of the court below be affirmed with costs.

Kennard et al v. Lafargue, President Police Jury, parish of Avoyelles.

NO. 3157.—JOHN H. KENNARD et al. v. A. D. LAFARGUE, President of the Police Jury of the Parish of Avoyelles.

A contract made with a levee inspector of a parish to construct a levee, under an ordinance of the police jury, is not affected by the subsequent repeal of the ordinance.

The act No. 312 of 1855, conferring authority on the police juries of all the parishes of the State to pass all such ordinances as they may deem necessary relative to roads, levees, bridges and ditches, is not repealed by the act of the seventeenth of February, 1866, entitled "An Act to ratify the appointment of levee commissioners previously made by the Governor of the State, and to continue their functions." This act only repealed such parts of the act of 1855 as conflicts with its provisions. Therefore the police jury of the parish of Avoyelles was authorized by the act of 1855, notwithstanding the act of 1866, to pass an ordinance authorizing certain levees within the parish to be built and to bind the parish for the payment of the cost of building the same.

APPEAL from the Seventh District Court, parish of Avoyelles. *Miller, J. Irion & Thorpe*, for plaintiffs and appellees. *A. H. Bordelon*, for defendant and appellant.

WYLY, J. The police jury of the parish of Avoyelles is sued by the plaintiffs on three drafts, drawn by the levee inspector of said parish on the collector of the levee fund, for the amount alleged to be due them on a contract for building a levee in 1867, on the right bank of Bayou de Glaises, containing 7863 cubic yards, at thirty cents per yard.

The defense is, besides the general issue, a denial that J. J. B. Kirk, who secured the services of the plaintiffs, ever was levee inspector and had authority to bind the parish of Avoyelles in said capacity; that he had no authority to draw the drafts, and that the lands upon which said levee was pretended to be built, were never previously assessed as required by the levee law. The respondent also averred that even if the said Kirk had authority to contract with the plaintiffs for the construction of the levee alleged to have been built, before entering into the performance of said work they were required to furnish a bond for the faithful performance of the contract, and that the document purporting to be a bond given by them is not such, because there were no internal revenue stamps affixed to it, as required by law.

On the issues stated the parties went to trial, which resulted in a judgment for the plaintiffs, as prayed for. The defendant has appealed.

What the parties term the levee law is an ordinance of the police jury, at the May term of 1867, dividing the parish of Avoyelles into road and levee districts, authorizing the appointment of levee inspectors and providing for the repairs and construction of roads and levees in said parish.

The ninth section thereof provides that "it shall be the duty of the levee inspector to cause the levees in their respective districts to be rebuilt in accordance with the provisions of this ordinance; that he shall cause to be let out to the lowest bidder by the cubic yard the levee on every proprietor's front, after an advertisement of fifteen

Kennard et al. v. Lafargue, President Police Jury, parish of Avoyelles.

days, by posting up in three conspicuous places in each district, of the time and place of selling the building of said levee; that the purchaser shall enter into a contract with the inspector and execute a bond with approved security in favor of the president of the police jury, or his successors in office, for one-third above the amount of his bid, to commence and proceed with the work without delay, and to complete it within the time specified in the contract, and on failure of the purchaser to comply with his contract in any particulars, the bond shall be forfeited, and it shall be the duty of the inspector to report the same to the president of the police jury, who shall proceed immediately to take the necessary steps to enforce the payment of the bond."

The ordinance further authorizes the inspector to receive the work when completed and to draw his drafts on the collector for the amount due the contractor.

The evidence in the record shows that the plaintiffs entered into the contract with the inspector and constructed the levee which was received by him, and that the drafts were given for the price thereof in pursuance of the ordinance of the police jury to which we have referred.

The subsequent repeal of this ordinance or levee law, as the parties call it, did not affect the plaintiffs, who contracted with the inspector while it was in operation.

Whether the bond given for the faithful performance of the contract was stamped or not is immaterial. It was accepted by the defendant; it is not the basis of this action; the plaintiffs are merely claiming the fruits of the faithful execution of the contract, and are suing on the drafts which the inspector gave them in settlement of the price of the levee at the time he received it.

There is no force in the bill of exceptions taken to the ruling of the court in permitting the drafts sued on to be received in evidence; and the reasons of the judge in the other bill to which our attention has been directed, are sufficient to justify his ruling.

As to the want of authority in the police jury to authorize the construction of this levee, we will remark that act No. 312 of the acts of 1855, "An Act relative to roads and levees," declares "that the police juries of all the parishes of this State are authorized to pass all such ordinances as they may deem necessary relative to roads and levees, bridges and ditches." * * * * *

But the defendant insists that all authority of parishes to construct levees is repealed by the act of the seventeenth of February, 1866, act No. 20 of that year, and entitled "An Act to confirm and ratify the appointment of levee commissioners provisionally made by the Governor of the State, and to continue their functions."

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This act gave the Levee Commissioners "full power to let out the contracts for the building and repairs of all levees in the State, which, in their judgment, are necessary to protect the alluvial lands from being overflowed," and it gave the said board the "entire control and management of the levees let out by them," * * * and it repealed all laws contrary to the provisions of the act.

We do not think this law repealed entirely the act of 1855 to which we have referred, giving authority to police juries to construct or provide for the construction of levees. It merely did so only so far as the exercise of the power heretofore delegated to the parishes conflicted with the provisions of the statute of 1866.

In adopting the ordinance under which the plaintiffs contracted to build the levee which gave rise to their cause of action, we do not see that the police jury of Avoyelles in the least conflicted with the act of 1866, conferring certain powers upon the Levee Commissioners of the State; and we think they had the right to pass the ordinance under the act of 1855 to which we have referred.

The evidence in the record fully sustains the judgment of the court below.

Judgment affirmed.

No. 3164.—LEWIS & GIST v. S. B. DANIELS, Sheriff, et al.

A motion is made to dissolve the injunction in this case on the ground that there was no affidavit made, as required by law. It appears that the order granting the injunction was rendered by the district judge. It appears, also, that the affidavit was made on the same day and signed by the party making it, and that both the affidavit and the order were written on the petition, the affidavit immediately preceding the order. The words "sworn to and subscribed before me," etc., are not followed by the signature of the judge. The order, which recites: "The foregoing petition and affidavit being considered," etc., is signed by the judge.

Held—That the non-appearance of the judge's signature to the *jurat* was a mere omission; that the signing of the order of injunction, which made special reference to the petition and affidavit, was one continuous act, and that the judge acted on the affidavit as having been made before him. 12 Rob. 132.

An injunction will not be set aside for informality or irregularity in issuing it, if it is manifest from the record that the plaintiff in injunction would be immediately entitled to another writ in case the one which had been granted, were dissolved. 12 An. 92; 18 An. 111; 21 An. 324.

A PPEAL from the Seventh Judicial District, Parish of Pointe Coupée.
Miller, J. Samuel J. Powell, for plaintiffs and appellees. *Collins & Leake*, for defendants and appellants.

TALIAFERRO, J. This is an injunction suit. Rudman, a judgment creditor of Lytle, seized under execution, as the property of Lytle, four hundred head of cattle, ten head of horses and a wagon. Lewis & Gist enjoined the sale of the property, alleging themselves to be the owners of it, and specially denied that Lytle had any right or title to, or interest in, any of the property seized. The plaintiff had judgment, and the defendant appealed.

23 170
48 1422

23 170
108 216

23 170
110 448

Lewis & Gist v. Daniels, Sheriff, et al.

The defendants moved to dissolve the injunction on two grounds: First, that there was no affidavit made as required by law; second, that the bond was insufficient. The objection to the affidavit is, that the *jurat* is not signed by an officer authorized to administer oaths. It appears that the order granting the injunction was rendered by the district judge of the proper district on the fourteenth of July, 1870. It appears, also, that the affidavit of one of the plaintiffs was made on the same day, and that both the affidavit and the order were written on the petition, the affidavit immediately preceding the order. The words "sworn to and subscribed before me," etc., are not followed by the name of any official. The order is signed by the judge, and it recites that "the foregoing petition and affidavit considered, it is ordered," etc. The affidavit is signed by Lewis, one of the plaintiffs in injunction. It is clear that the non-appearance of the judge's signature to the *jurat* was a mere omission. Both the affidavit and the order have the same date, and we regard the whole as a continuous act. A case nearly identical with the present came before this court in 1845. The objection there was that the judge had not signed the *jurat* of the affidavit made to obtain an attachment. The order and the unfinished *jurat* bore the same date. In that case Judge Bullard said: "The order recites that the judge had read the petition and documents annexed. He therefore acted on it as an affidavit sworn to before himself, and in signing the order containing that expression, by the strongest implication, certified that it had been sworn to before himself." See 12 Rob. 132. In that case the motion to dissolve was overruled, and we think the same ruling should be made in the present case.

A bill of exceptions was taken to the admission of the judge's testimony invoked by the plaintiffs to explain the omission. The objection is, that as the motion was to dissolve on the face of the papers, no evidence was admissible except as to the question of damages. It is unnecessary to pass upon this objection, as we consider the validity of the affidavit sufficiently established without extrinsic evidence.

On the second ground, that the bond is insufficient, we are not satisfied that the objections to it are tenable, but it is manifest that the plaintiffs would be entitled to renew their injunction, if the present writ were dissolved. We deem it proper to follow in this case the well established usage and reject the motion. 18 An. 111; 21 An. 324, and cases there cited.

ON THE MERITS.

¶We think the evidence establishes that Lytle was not a part owner of the property seized. He, it seems, superintended the driving of the stock from Texas, where it was purchased, to the Mississippi river,

 Lewis & Gist v. Daniela, Sheriff, et al.

near the mouth of Red river, whence it was the intention of the owners to send them by steamboat to Tennessee. In the character of manager or head drover, he had charge of the business of transporting the cattle and horses, and it is shown that on several occasions, not, however, in presence of the owners, he spoke of the stock as being his own. On one occasion, in New Orleans, some months previous to the seizure, Lewis, in a casual conversation in presence of Lytle and others, remarked that he and Lytle had a stock farm in Tennessee, and that they were then on their way to Texas to purchase stock to carry there. It is shown, we think satisfactorily, that Lytle's interest in the adventure was contingent and remote, depending upon the ultimate net profits of the enterprise which contemplated the fattening and improving the animals for market after they reached Tennessee. The operation might finally turn out advantageous, or, in the event of losses and unforeseen casualties, it might prove abortive. There was not, when the seizure was made, any appreciable right or interest of Lytle in the stock that could make it the subject of seizure under execution.

We can not regard the loose declarations which are proved to have been made in respect to Lytle's having any interest in the property as entitled to have serious consideration against the positive evidence to the contrary. We think the defendants, by seizing imprudently the property in question, have unfortunately, yet properly incurred the penalty in damages which has been adjudged against them.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

 No. 3212.—ZENON AREAUX v. VALERY L. MAYEUX et als.

If more than five years have elapsed between the date of credits placed on a note, the latter credit must be shown to be in the handwriting of the debtor in order that it may be urged as an interruption of prescription. Evidence that it is in the handwriting of the creditor with the knowledge of the debtor, will not suffice to interrupt prescription. 21 An. 743.

APPEAL from the Seventh Judicial District, parish of Avoyelles. *Miller, J. Edwards & Ducoté*, for plaintiff and appellant. *Waddill & Barbin* and *Irion & Overton*, for defendants and appellees.

TALIAFERRO, J. The plaintiff sues on a promissory note, dated January 9, 1859, made payable one year after date. Several credits are indorsed on the note, the second on the ninth of January, 1862, the third and last on the twenty-fourth of August, 1867, more than five years intervening. Suit was brought and citation acknowledged on the third February, 1870. The plea of prescription was made by the defendant, which being sustained by the court below and judgment rendered against the plaintiff, he has appealed.

Areaux v. Mayeux et al.

It seems the indorsement of the last credit is in the handwriting of the plaintiff, who testified that "it was made with the knowledge and consent of Valery J. Mayeux, one of the defendants, who promised to pay and offered to pay the balance of the note, but the witness, thinking the debt well secured, left it in the hands of the defendant," etc.

Prescription had accrued prior to the date of the credit last appearing on the note, and, the act of 1858 requiring a written promise of the debtor to pay the debt in order to revive the obligation, we think the judgment correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs. 21 An. 740.

No. 3153.—BERTRAND DROGRE v. CHARLES MOREAU and Wife.

23 173
48 474

In a proceeding under the act of thirtieth of April, 1853, to revive a judgment, the question whether the judgment was rendered on insufficient evidence, can not be inquired into.

APPEAL from the Seventh District Court, parish of Avoyelles. *Miller, J. Irion & Overton*, for plaintiff and appellee. *Waddill & Burbin*, for defendants and appellants.

WYLY, J. This is a proceeding to revive a judgment under the act of the thirtieth of April, 1853. It was before this court in September, 1869, at Opelousas, and was remanded because the record did not contain satisfactory evidence of the existence of the judgment and the ownership thereof by the plaintiff. See 21 An. 630.

The court at the trial on the rehearing gave judgment for the plaintiff, and the defendant, Mrs. Moreau, has appealed. Proper evidence of the existence of the judgment sought to be revived and of the assignment thereof to the plaintiff seems to have been adduced, and we think the judgment of the court below, ordering the revival of the judgment, is correct.

The defense urged by the appellant is no ground to resist the revival of the judgment. The act of 1853 is a statute, fixing the prescription of judgments at ten years and providing the proper mode of averting the said prescription. It is not a statute authorizing a proceeding to annul a judgment on the ground that it was rendered on insufficient evidence.

Whether the judgment sought to be revived was rendered on insufficient evidence or not, is a question foreign to the issue in this case.

We think the plaintiff has complied with the statute prescribing the mode of reviving judgments, and the grounds taken by the appellant are unworthy of serious consideration. Let the judgment be affirmed with costs.

28	174
52	1437

No. 3214.—SUCCESSION OF MELISSA ROBINSON, Deceased.—On Opposition to Administrator's Account.

The revenues of property which belongs to the husband, situated in Mississippi, who resides in Louisiana, do not belong to, or form a part of, the community. Therefore the husband who administers on the estate of his deceased wife, is not required to account to the heirs for the revenues derived from property thus situated during the marriage.

A PPEAL from the Parish Court, parish of East Feliciana. *Boedicker*, Parish Judge. *Cross & Hardee* and *Race, Foster & E. T. Merrick*, for administrator, appellant. *Kernan & Lyons*, for opponents and appellees.

TALIAFERRO, J. The administrator of the estate of Melissa Robinson, deceased, having filed his final account of administration, one of the heirs of the deceased presented an opposition, in which he charges that the administrator has failed to account for several items of property which had belonged to the succession, and for moneys received from various sources on account of the estate. The opposition takes a wide range, embracing much the greater part of the account. It was sustained as to a portion of the several pieces of property specified, as unaccounted for, and also in respect to several sums of money, alleged to be proceeds of property of the estate and not set down upon the account. The deficiencies complained of were estimated to amount to \$5930, which sum the administrator was adjudged to charge himself with, in addition to the amount with which he charged himself on the account.

From this judgment the administrator has appealed.

The contest in this court is limited to the following items: One wagon, \$25; two mules, \$180; proceeds of cotton on hand, \$5000; one carriage, \$200.

It appears that the administrator, who is the surviving husband of the deceased, who died at Jackson, Louisiana, in the year 1863, removed to that place in the year 1851 from the State of Mississippi, where he owned a plantation which he continued to cultivate and derive revenue from after his removal to Jackson. It is shown that he had a large business to attend to in Mississippi besides that of his plantation there; that his purpose in making his residence at Jackson was to avail himself of the benefit of the schools at that place, having children of his own by a former marriage and those of his wife by a former husband to educate; that it was the custom of the family annually to return to Mississippi to spend the school vacations. It does not appear that the administrator carried on business to any great extent in Louisiana. He, however, acquired some property in the State. This, of course, was community property, and the property he administered was community property. But the evidence does not establish the property which the administrator is ordered

Succession of Melissa Robinson.

to account for, except the carriage, was community property. The cotton, the proceeds of which he is required to charge himself with, was produced on his own plantation in Mississippi. It is proved that the wagon and the two mules also came from that plantation, where they properly belonged, the wagon being used frequently at Jackson, as occasion required, and then sent back to the plantation. The mules, it is established, were paid for by the administrator after the death of his wife and out of his own funds. The family carriage was purchased in 1856, and, after being much used, he gave it in payment of a debt of his own in 1863. The \$200, proceeds of the carriage, should be charged against him.

It is therefore ordered, adjudged and decreed that as relates to the value of the wagon and mules, estimated at \$205 and the proceeds of cotton, \$5000, the opposition be overruled and rejected; but sustained as to \$200, alleged value of the carriage. It is further ordered that that sum be charged on the administrator's account against him, in addition to the amounts with which he has charged himself, and that the account, as thus amended, be approved and homologated.

No. 3142.—PETER ANDERSON *v.* CARROLL, HOY & Co.

23	175
121	14

Real property in possession of a party, under a recorded title translativ of property, can not be seized by a judgment creditor of the former owner, unless it be shown that the sale was simulated. The question, whether the judgment under which the sale was made, is null because it was revived on insufficient evidence, and whether the sale is null because the sheriff failed to observe all the forms of law in making the seizure, etc., can not be inquired into, collaterally, by a judgment creditor, who has caused the property to be seized without any reference to the sale. Such questions can only be examined in a direct action brought to annul the judgment or the sale made under it.

A PPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. Thomas C. Manning*, for plaintiff and appellee. *R. A. Hunter and R. J. Bowman*, for defendants and appellants.

WYLY, J. The plaintiff enjoined the sale of a plantation in the parish of Rapides, seized by the defendants as the property of their judgment debtor, Mrs. Eliza Seip, on the ground that the same belonged to him, having been purchased several months previous, under the judgment of *A. J. Dennistoun & Co. v. Eliza Seip*, which said judgment the plaintiff avers is superior in rank to that which the defendants are attempting to execute.

The answer is the general denial; the allegation, that the sale to the plaintiff was a simulation; and also that its nullity should be declared for the following causes, to wit:

First—Because the sheriff never made an actual seizure by taking possession of the property.

 Anderson v. Carroll, Hoy & Co.

Second—Because the pretended bid of the plaintiff was made for him by the sheriff as his agent at the sale.

Third—Because the judgment of the defendants is based on a special mortgage, superior in rank to that under which the plaintiff purchased, the bid by the latter being less than the amount of this special mortgage.

Fourth—Because the judicial mortgage of A. J. Dennistoun & Co. was not properly reinscribed and the judgment was revived under the act of 1853 on insufficient evidence.

The court perpetuated the injunction and the defendants have appealed.

The evidence shows that the plaintiff was in possession under a recorded title and there was no simulation as charged; that he purchased under a judgment and mortgage ostensibly valid and superior in rank to that of the defendants. Such a title can not be treated as an absolute nullity; it can not be attacked collaterally. Actual contracts, even though made in fraud of the rights of creditors, can not be annulled, except by a direct action.

Whether the mortgage under which the plaintiff purchased, was properly reinscribed, or whether the judgment was revived upon insufficient evidence or not, are questions that can not be inquired into in this form of attack.

The defendants must proceed by a direct action, if they wish the grounds of nullity set up by them to be inquired into.

Let the judgment of the court below be affirmed with costs.

No. 3189.—D. G. WALKER v. SUCCESSION OF D. C. HAYS—E. B. TOWNE, Public Administrator.

A judgment becomes final from the date of the signature of the judge *a quo*, and if ten years are allowed to elapse from the date of such signature before citation of revival is served on the defendant, it is prescribed. The delay caused by a suspensive appeal will not be counted in favor of the judgment creditor to defeat the plea of prescription.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. J. C. Seale*, for plaintiff and appellant. *E. D. Farrar*, for defendant and appellee.

LUDELING, C. J. D. G. Walker obtained a judgment in the district court of Madison parish for \$1375 against D. C. Hays on the twenty-ninth day of October, 1859. Hays took a *suspensive* appeal from this judgment and on the seventeenth of December, 1860, the Supreme Court affirmed the judgment.

Proceedings were begun to revive the judgment, and citation was issued on the fourteenth of November, 1870. The defendant pleaded the prescription of ten years, which was sustained by the court *a qua*.

Walker v. Succession of Hays—Town, Public Administrator.

The only difference between this case and the case of *Arrowsmith v. Durell*, Pontalba subrogated, reported in 21 An. 295, is that a *suspensive* appeal was taken in this case, whereas a *devolutive* appeal had been taken in the case decided. We can not perceive how that difference can affect the prescription of the judgment.

"The rendition of the judgment" is the signing thereof by the judge; at least that act fixes the date of the judgment and the period from which prescription begins to run. C. P. 545, 546, 547 and 555.

The act of 1853, page 250, is clear and emphatic: "Hereafter all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of the judgment." 21 An. 295.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

No. 2206.—JULES TUYES v. AVEGNO & WIDLOZ.

Jules Tuyes and Avegno & Willoz, brokers, purchased on joint account three hundred shares of the stock of the Commercial Waterworks Company for the aggregate sum of \$20,625. For the payment of this amount Avegno & Willoz paid \$625 in cash and Tuyes executed his notes for the balance, \$20,000, on time, and gave as collateral security the three hundred shares of stock. The stock, subsequently and before the notes were paid, depreciated in value. The notes, with the collaterals, were held respectively by the Bank of America, the Merchants Mutual Insurance Company and the Mutual Insurance Company. The collaterals having depreciated in value, the holders called on the maker of the notes for a margin, which was for a part payment. The maker failed to pay and the shares of stock were sold according to law by the pledgees. At this sale the stock failed to bring the amount of the notes by a deficit of \$9029 80.

Held—That, the maker of the notes having purchased the stock on joint account with Avegno & Willoz, brokers, and having paid the notes or become liable for their payment, they, the brokers, were liable to him for the one-half of the loss resulting from the sale of the stock by the pledgees, less the amount of the cash which they paid in at the time of the purchase.

APPEAL from the Seventh District Court, parish of Orleans.
Collens, J. Cyprien Dufour, for plaintiff and appellee. W. H. Hunt, for defendants and appellants.

LEDELING, C. J. On the eighth of April, 1867, Avegno & Willoz, brokers, purchased, on joint account with the plaintiff, three hundred shares of the Commercial Waterworks Company, at \$68 75 per share, amounting in the aggregate to \$20,625. For the payment of these shares, Avegno & Willoz advanced \$625 and the plaintiff, in accordance with the agreement of the parties, executed three promissory notes, one in favor of the Bank of America for \$6000, one in favor of the Merchants' Mutual Insurance Company for \$7000 and one in favor of the New Orleans Mutual Insurance Company for \$7000, all bearing eight per cent. per annum interest; and as collateral security for the payment of the notes, the three hundred shares of the Commercial Waterworks Company were given to the bank and insurance companies respectively.

Tuyes v. Avegno & Willos.

Several months after the maturity of the notes and after the notes had been renewed several times by the plaintiff, the pledgees notified the pledgor that, the stocks pledged having depreciated in the market, they would require a margin, that is, the payment of a part of the notes, and failing to do this the three hundred shares of the Commercial Waterworks Company were sold according to law to satisfy the notes held by the pledgees. The loss incurred by the parties in this venture was \$9029 80, one-half of which must be borne by the defendants. The whole amount was paid by the plaintiff and he claimed from his partners their proportion, less the sum advanced by them. This he is clearly entitled to recover. C. C. 2865 [2836]; Pothier, Contrat de Société, c. 1, sec. 4.

It is therefore ordered that the judgment of the court *a qua* be affirmed, with costs of appeal.

No. 3131.—TUTORSHIP OF THE MINOR, MARY C. OSBORN.

If the appellee be cited in his individual capacity, when he occupies only a representative capacity in the suit, the fault is imputable to the appellant, and the appeal will be dismissed on motion.

APPEAL from the Parish Court, parish of Rapides. *Barlow*, Parish Judge. *William A. Seay*, for appellant. *H. S. Losee*, for appellee.

WYLY, J. The motion to dismiss this appeal must prevail, the appellee having been cited in his individual capacity, when the record shows that he occupies a representative capacity only, and the fault being attributable to the appellant, who only asked that he be cited in his personal capacity in the petition for appeal. 20 An. 35.

It is therefore ordered that the appeal herein be dismissed at the cost of the appellant.

No. 2208.—MICHAEL CARVIN v. PHILIP DRUMM et als.

Plaintiff took a rule on defendant to cancel a note and erase a mortgage given to secure its payment. The defendant set up a reconventional demand for money which he was forced to pay as garnishee in a suit against the plaintiff in rule. To this form of proceeding no exception was taken.

Held—That the plaintiff could only be condemned to pay the amount on the reconventional demand which the defendant was obliged to pay as garnishee.

APPEAL from the Seventh District Court, parish of Orleans. *Oollins*, J. *E. W. Huntington*, for plaintiff and appellant. *Cotton & Levy*, for defendant and appellee.

HOWE, J. The plaintiff took a rule on the defendant and the Recorder of Mortgages to have a note and mortgage held by defendant. Drumm, canceled.

Carvin v. Drumm, et al.

The defendant, Drumm, in his answer set up a reconventional demand. No exception was made to the form of action.

The court below decided in favor of the demand of the plaintiff for the cancellation of the note and mortgage, and in favor of defendant, Drumm, on the reconventional demand, to the extent of \$2000, for which judgment was given against plaintiff. The plaintiff has appealed.

The principal item of the defendant's claim is for money he was forced to pay as garnishee in case of *Mrs. Caroline Carvin v. Michael Carvin*, plaintiff at bar. We think the amount should be reduced to \$1816, being the sum that defendant was actually obliged to pay, and that it should bear interest by way of arrearage, from October 27, 1864.

It is therefore ordered that the judgment appealed from be amended in favor of plaintiff, by reducing the amount of the money judgment against him to \$1816, with interest from October 27, 1864; that in all other respects the said judgment be affirmed, and that the defendant, appellee, pay costs of appeal.

No. 3216.—*EMILY C. HOPGOOD and Husband v. PENELOPE A. DAWSON, etc.*

The failure to cite a party in her proper capacity in a suit to revive a judgment will render void the judgment of revival. Therefore, if it be shown that the judgment of revival is null because no proper and legal citation was served on the defendant, the heirs who have appeared in the suit by way of intervention, may plead that it is prescribed because it has not been revived.

APPEAL from the Fifth District Court, parish of East Feliciana. *Posey, J. Cross & Hardee*, for plaintiff and appellant. *Charles McVea*, for defendant and appellee.

Howe, J. In this case two actions were consolidated in the court below; the one begun in 1869 to enforce against the defendant in her own right and as tutrix the payment of a judgment against her deceased husband, W. W. Dawson, rendered on the twenty-second November, 1860; the other to revive the said judgment as against the succession of W. W. Dawson. The petition to revive was filed on the twelfth September, 1870, and the prayer asked for the citation of the defendant in her capacity of administratrix, and not otherwise. The citation was issued, addressed to her "personally and as tutrix," and was served September 21, 1870. Mrs. Wildblood and Mrs. Wicker intervened on the nineteenth January, 1871, alleging themselves to be major heirs of W. W. Dawson, and made the plea of prescription of ten years. On the twenty-seventh January, 1871, the defendant coming in as administratrix, and for this purpose only, made what was called a "motion to strike out a default," upon the ground that there had been no proper citation against her as administratrix. On the same day the cause was tried, and judgment was thereafter rendered

Hopgood and Husband v. Dawson, etc.

against plaintiff and in favor of defendant on the ground, that "the judgment on which the suits are based, had not been revived in accordance with law and for want of proper citation." The plaintiff appealed. The defendant, personally and as tutrix, has filed in this court the same plea of prescription of ten years made by the intervenors in the court below.

The plea of prescription is well taken. The judgment was prescribed November 22, 1870, and was not revived by citation to the "defendant" in the judgment "or his representative," as required by law. R. S. 2813. The citation served on Mrs. P. A. Dawson, personally and as tutrix, was not a citation to W. W. Dawson "or his representative."

Judgment affirmed

23	180
49	500
23	180
50	204
23	180
125	1099

No. 2184.—**ENOCH J. BARKSDULL**, for the use of his minor child **CHARLES RANSON BARKSDULL**, v. **THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY**.

A street railroad company is responsible in damages if, through the negligence or carelessness of the driver of the street car, a boy is run over and injured. The measure of the damages in such cases is to be determined by the extent of the injury done. If the finding of the jury is supported by the evidence in the record both as to the fact of the infliction of the injury through the carelessness and negligence of the driver of the car and the extent of the injury done, their verdict fixing the amount for which the company is liable, will not be disturbed on appeal.

If the evidence shows that the boy who was run over by the car, was physically and mentally able to take care of himself on the street, and that he was in the habit of traveling the public streets alone, the driver of the car or the company owning the road will not be permitted to set up in defense to the action for damages, that the accident occurred through the negligence or want of consideration in the father in allowing the child to go on the streets alone, nor will the fact that the child failed to get out of the way be allowed to weigh in favor of the company in mitigation of damages, if the evidence shows, as in this case, that the driver was driving the car at the time of the accident at an unusual, if not an unlawful, rate of speed. But in such case the company will be held liable to the full extent of the damages caused by the injuries which the boy has sustained.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Gibson & Austin, Rufus Waples and W. H. Hunt*, for plaintiff and appellee. *L. E. Simonds*, for defendant and appellant.

This case was tried by a jury in the court below.

TALIAFERRO, J. This is an action brought by a father for the use of his minor child against the defendants to recover damages for alleged injuries of a most serious character inflicted upon the child, a boy of about the age of five years and a half, through the gross and culpable carelessness and negligence of a car driver, an agent and employe of the company, by which negligence the child was run over by one of their street cars and horribly mangled, having both his legs

crushed, making it necessary to amputate both, one above the knee, thus rendering him a hopeless cripple for life. The plaintiff prays damages to the amount of fifty thousand dollars.

The answer is a general denial. The defendants specially deny the culpable negligence charged and say they are not liable in damages to the plaintiff.

The case in the lower court was before a jury which gave a verdict of fifteen thousand dollars as damages, and from the judgment, responsive to the verdict, the defendants have appealed.

We gather from the evidence that the deplorable accident happened on the nineteenth of June, 1866, at the intersection of St. Charles and St. Mary streets in the city of New Orleans. There is much difference in the statements of witnesses as to the precise spot where the car ran over the child. Not long before the accident he was seen sitting on the end of one of the cross-ties which projected several feet beyond the car track and partly over the ditch on the right hand side of St. Charles street in coming down from Carrollton. The distance between the centre of this tie and the upper crossing of St. Mary street is shown to be six feet. But the inquiry regarding the *locus in quo* is satisfied by the concurrence of the witnesses in relation to where the child was lying after the car passed over him. He was found lying in St. Mary street near the upper crossing of that street over St. Charles street, which crossing is the first passed over at St. Mary street by cars coming down from the direction of Carrollton. The testimony of the newsboy, Confort, who was the first upon the spot after the accident and who took up the child, is very clear and distinct on this subject. He says: "Just as soon as he was run over I ran to him. There was nobody else with him. He was in the middle of the track on St. Mary street. He was lying where he was run over, lying in the same place." It is in proof that at the time of the occurrence two horse cars and a train of steam cars were coming down St. Charles street and were near each other. One of the witnesses says the horse cars were racing, and four of the witnesses at least say that the car which ran over the boy was moving rapidly. One of them states that "the driver was whipping his mule;" "on this occasion the mule was put to his best." Another says: "He was whipping the mule very fast; the mule was in a gallop; both horses were in a gallop in the other car." A third witness says: "I do know the two cars were *running*, Mr. Burke (the name of the driver implicated) and another car; it was one of those long cars." A fourth said: "The mule was going pretty fast because the driver could not stop it; he would not stop it altogether, but he was going to stop it some; I knew he was behind time because he had plenty of passengers." The driver himself on the stand said: "I put on the brakes and the harder I put on the brakes the harder the

mule pulled; the brake did not have the desired effect on the car or account of having so many passengers; if it was not for that, I might have stopped the car before the child was run over." In answer to the question: "How many passengers had you?" he replied: "Seventeen or eighteen, perhaps twenty, I can not exactly say; I had four on the platform, the two sides were full and they were standing up inside."

The testimony establishes clearly that the car was going at a greater speed than usual and greater, we infer, than that permitted by the city ordinances, for we find that the steam cars were not allowed within the city limits to run at a faster rate than four miles per hour. One of the witnesses thought that the car, as it passed him between Jackson and St. Andrew streets, "was going at the rate of eight miles an hour." The mule it seems was not a safe and properly trained animal for the business. The driver stated that the steam cars passed him about half a square back from where the accident happened; that he saw the mule begin to shy and become excited on seeing the steam train, and it was then he put on the brakes but ineffectually.

There are two bills of exceptions in the record to the charge given by the judge to the jury on the trial of the case in the lower court. It is not necessary in determining this case to pass upon them specially. They relate to the rules in regard to what is termed contributory negligence. These rules have no application to the facts shown in this case. It is proved that the boy who was overtaken by this terrible disaster, is a child of more than ordinary activity and intelligence; that he was capable of taking care of himself; that his parents frequently sent him about on errands and on several occasions to get things at the Magazine Market, many squares off from the place of their residence. There is no question that he was run over while endeavoring to cross St. Charles street on the upper crossing of St. Mary street. He had a right to be on the streets, and it was no carelessness in his father to permit him to be upon them.

On the other hand the evidence does show on the part of the driver, if not a malicious carelessness, at least a negligence and want of care highly culpable in a man whose duties require him to be constantly on the alert and to exercise judgment and caution in the performance of those duties. Apart from its responsibilities for the acts of its agents, we are not prepared to say that the company may not have been remotely at fault in the matter of supervision over the manner in which their business was conducted. The developments of this case, we will further remark, present in our opinion matter of grave consideration for the law maker and which should suggest to him things *dignas lege regi*.

The judgment of the lower court, we think, was properly rendered, and it is therefore affirmed.

Thompson, Liquidator v. Edwards.

No. 2059.—J. D. THOMPSON, Liquidator v. D. EDWARDS.

If the tender of the amount admitted to be due be not made by the debtor in the manner provided in article 407 of the Code of Practice and the creditor brings suit, the debtor must be condemned to pay the costs.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Bentwick Egan*, for plaintiffs and appellants. *M. Grivot*, for defendant and appellee.

HOWELL, J. The only error we find in the judgment appealed from is in making the plaintiff pay costs in the lower court. The suit is for the balance due on a contract for constructing a boiler and extra work in altering it. The defendant admitted the balance due on the contract, but did not make a legal tender thereof in accordance with the provisions of article 407, C. P., and hence he must pay the costs.

On the question of the extra work, the evidence, in our opinion, sustains the conclusion of the judge *a quo*.

It is therefore ordered that the judgment appealed from be so amended as to condemn the defendant to pay costs of the lower court, and, as thus amended, it be affirmed. Defendant and appellee to pay costs of appeal.

No. 2032.—IRBY, MCDANIEL & CO. v. J. E. FORE & CO.—P. HAMBLETON et als., third opponents. HANCOCK & CO. v. J. E. FORE & Co.—P. HAMBLETON et als., third opponents.

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If more than ten days are allowed to elapse before application is made for an appeal, the judgment of the court below, if rendered in the parish of Orleans, becomes executory, and a devalutive appeal only can be taken thereafter. In such a case a motion made, after the lapse of ten days from the signing of the judgment, to quash the execution in the case, on the ground that the bond given for the appeal is sufficient in amount for a suspensive appeal, will be dismissed, because a suspensive appeal will not lie after ten days from the signing of the judgment.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hays & New*, for plaintiffs and appellants. *John M. Bonner*, for third opponents, appellees.

HOWELL, J. Two appeals are taken in these proceedings, one by the plaintiffs from a judgment in favor of the third opponents, awarding to them the proceeds of the cotton which plaintiffs sought to attach as the property of the defendants.

There is no error in the said judgment. The evidence shows the cotton to have belonged to the third opponents and not to the defendants.

The second appeal is taken by the third opponents from a judgment on a rule to quash the execution issued by them on their judgment against the plaintiffs. The rule was based on the ground that the

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appeal bond was sufficient in amount to operate as a suspensive appeal. It appears, however, that the appeal was applied for after the lapse of ten days following the signing of the judgment which thereby became executory.

It is therefore ordered that the judgment in favor of Peter Hambleton and others, rendered on the second November, 1868, and signed on the second December, 1868, be affirmed, and that the judgment rendered on the fifth and signed on the twelfth January, 1869, quashing the *feri facias* issued herein, be reversed and the rule to quash taken by plaintiffs be dismissed with costs in both courts

No. 3168.—WARREN & CRAWFORD v. ANN E. CHILDRESS, Tutrix.

The acknowledgment (by the executor) of the correctness of notes, held by a creditor of the succession, need not be made on the notes themselves but may be made on a separate piece of paper.

Such acknowledgment, to work an interruption of prescription, must in all cases be made in writing.

APPEAL from the Seventh District Court, parish of Avoyelles. *Miller, J. Irion & Overton*, for plaintiffs and appellees. *Waddill & Barbin*, and *S. R. Thorpe*, for defendant and appellant.

HOWELL, J. The only question for decision in this case is whether an interruption of prescription is proven. Plaintiffs offered the following document to show the interruption:

“BIG BEND, Louisiana, October 11, 1866.

Messrs. Warren & Crawford, New Orleans:

GENTLEMEN—I hereby obligate and bind myself to furnish you the first mortgage note, when my place is sold, for the sum of five thousand dollars, being for the payment of the indebtedness of my late husband, W. B. Marshall, to your house. If the property is sold on time, the notes will draw eight per cent. interest from the date of sale or the execution of the notes. ANN E. MARSHALL.”

On this document was a memorandum at the time it was signed, showing the said indebtedness to consist of three notes, corresponding with those in suit, and an account, the amount of each being specified. To its introduction the defendant objected on the grounds that it was at variance with the obligations in plaintiffs' petition; that it was offered and accepted by the parties to it as a compromise; that it was a personal obligation binding on Mrs. Marshall only and in nowise affecting the succession of her husband, and can not be used to bind the succession or interrupt prescription running in its favor. The judge overruled the objections for the reason that Mrs. Marshall was at the time administering the succession as tutrix, and the document was admitted to prove that plaintiffs had presented their claim and

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obtained its acknowledgment before prescription accrued. We think the ruling correct. The document contained a direct acknowledgment of the debt of the succession, and was not offered to fix any personal liability upon the defendant. In the case of the succession of Yarborough it was held not to be essential that such acknowledgment should be upon the evidence of the claim or a paper annexed to it, provided it be in writing.

The judge sustained the plea as to the open account and overruled it as to the notes, and gave judgment for the latter. In this there is no error.

Judgment affirmed.

No. 3145.—LEHMAN, NEWGASS & Co. v. Mrs. E. E. BARROW and Husband.

A written agreement by which the wife separated in property from her husband is to become the purchaser of property seized under judgments against her husband and to execute her notes to the respective judgment creditors for the amounts due, is admissible in evidence on the trial of a suit to enforce payment of the notes or note thus given by the wife. Parol evidence is also admissible to show the circumstances and manner of completing the agreement, as set forth in the written instrument.

The wife, separated in property from her husband, has the right to become the purchaser of his property under seizure at a price sufficient to cover the judgment against him, and the note given by her, with the authorization of her husband to sign it, in payment for the price, is binding upon her, notwithstanding it went to the payment of the debts of the husband.

The husband is not bound on a note which he has signed only for the purpose of authorizing his wife to make and sign it, even though it be a joint and several obligation. The words, "we jointly and severally promise," are qualified and restricted by the word "authorizing," placed before the signature of the husband to the note.

A PPEAL from the Seventh District Court, parish of West Feliciana. *Miller, J. Thomas Butlar*, for plaintiffs and appellees. *Collins & Leake*, for defendants and appellants.

HOWELL, J. The plaintiffs ask judgment against the defendants *in solido*, with a recognition of mortgage upon the following note:

"WEST FELICIANA, La., July 7, 1866.

One day after date, for value received, we jointly and severally promise to pay Hilliard B. Barrow the sum of ten thousand two hundred and eighteen dollars and nineteen cents with interest thereon at the rate of five per cent. per annum from date until paid, payable and negotiable at the ———

ELEANOR E. BARROW.

Authorizing, JOHN J. BARROW."

The note is identified with an act of mortgage of same date and has on it a credit of \$500.

Mrs. Barrow answers that said note and mortgage were executed for a debt of her husband in favor of said H. B. Barrow, being the amount due by him as tutor of the latter, of which the sum of \$8133 35 was for the price and hire of slaves.

The husband, John J. Barrow, answers that he signed the note only for the purpose of authorizing his wife, as was well understood by the payee, and that the consideration was as stated by his wife.

Judgment was rendered against the defendants *in solido* and they appealed.

In 1861 John J. Barrow filed accounts of tutorship showing balances due the minors, Mrs. A. R. Barrow, wife of W. H. Richardson, for \$7083 16, Hilliard B. Barrow \$10,493 19 and Emily R. Barrow \$10,344 69. These accounts were homologated in December, 1865. In 1866 Mrs. Richardson and H. B. Barrow issued *fi. fas.* on their judgments and on the seventh July, 1866, the entire property, real and personal, of John J. Barrow, the tutor, was sold at sheriff's sale and Mrs. E. E. Barrow, his wife, separated in property, purchased it at its appraisement, \$13,735, as shown by the sheriff's return. On the same day she gave her notes secured by mortgage on said real property to Mrs. Richardson, H. B. Barrow and J. J. Barrow, tutor of E. R. Barrow, for the sums due them respectively by the said tutor and amounting to \$27,646 04, payable one day after date, J. J. Barrow, the husband, authorizing the execution of the mortgage and signing the notes, as shown above.

To show that the note sued on, being one of the three so given and acquired after maturity, was made for the separate interest of Mrs. E. E. Barrow, the plaintiffs introduced in evidence the following document:

"State of Louisiana, parish of West Feliciana—Articles of agreement entered into, made and concluded on this the — day of —, A. D. one thousand eight hundred and sixty-six, between Mrs. Amanda R. Barrow, wife of Wade H. Richardson, herein duly aided, assisted and authorized by her said husband, Wade H. Richardson, and Hilliard B. Barrow of the first part and Mrs. Eleanor Barrow, wife of John J. Barrow, duly and legally separate in property from her said husband and also duly aided, assisted and authorized by him to make this agreement, party of the second part as follows to wit: Now it is understood and agreed between the said parties that, as the said Amanda R. Barrow and Hilliard B. Barrow of the first part have a judgment against the said John J. Barrow who was their tutor during their minority, as will appear from the records of the Seventh Judicial District Court in the parish of West Feliciana, each respectively for the following amounts of money, to wit: Mrs. Amanda Barrow for the sum of seven thousand and eighty-three dollars, with five per cent. per annum interest thereon from seventh day of May, 1866, and Hilliard B. Barrow for the sum of ten thousand two hundred and eighteen dollars and nineteen cents, with five per cent. per annum interest from — day of —, which said judgment operates and carries with it

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a tacit mortgage upon all the property of the said tutor, John J. Barrow: Now the parties of the first part, as aforesaid, agree with the party of the second part that the said Mrs. Eleanor Barrow, wife of John J. Barrow, separate in property as aforesaid, and herein duly aided and authorized by her said husband to enter into this agreement, shall become the purchaser of the property seized and now in the possession of the sheriff by virtue of a writ of *fiery facias* issued at the instance of Hilliard B. Barrow and Amanda Barrow, aided and authorized, as aforesaid, by her husband, Wade H. Richardson, and by her bidding the full amount due the said Hilliard B. Barrow and Amanda Barrow and Miss Emily R. Barrow from the said John J. Barrow, tutor as aforesaid, and that the said Eleanor Barrow, purchasing as aforesaid, shall then and there execute a mortgage in favor of the said Hilliard B. Barrow, Amanda Barrow and Miss Emily R. Barrow, being and to be the first mortgage upon all of the property of the said Mrs. Eleanor Barrow for the full and entire amount and sum of the indebtedness of the said John J. Barrow, tutor, to the said Hilliard B., Amanda and Emily R. Barrow, which said mortgage is to have the full force and effect of and import a confession of judgment, as if rendered in any court of competent jurisdiction, the said Mrs. Eleanor Barrow, aided and authorized as aforesaid, executing her several notes, due and payable one day after date to the order of the parties of the first part, each respectively for the amounts due them from John J. Barrow, said notes to be executed and properly identified with said act of mortgage.

ELEANOR E. BARROW.

Authorizing, JOHN J. BARROW.

H. B. BARROW.

AMANDA R. RICHARDSON.

W. H. RICHARDSON."

Witness: W. W. LEAKE.

To this document and the testimony of several witnesses in connection with it, the defendants excepted on the grounds that they were not admissible to contradict or explain the sheriff's transfer and return on the writs in the case of H. B. Barrow and Mrs. A. R. Richardson and Husband v. John J. Barrow, and to show that, besides the price stipulated in the act of sale to Mrs. E. E. Barrow, she was to pay another and further sum. The objections do not apply to the written instrument, which is the evidence of the contract between the parties, and the sale by the sheriff was a part of the mode or means of carrying out that agreement, and the parol evidence is in aid of the written, showing the circumstances and manner of completing the agreement between the parties. Besides, the giving of the notes and mortgage after the sheriff's adjudication warrants the admission of the instrument and the oral evidence to show how the apparent discrepancy

occurred, and good faith on the part of the purchaser forbids the exclusion of such proof. The evidence was properly admitted. The authorities cited by defendants do not apply.

It is manifest that the parties intended that Mrs. Eleanor E. Barrow should become the purchaser of her husband's property under seizure, at a price sufficient to pay the debt for which it was to be sold, and the evidence is clear that she did so—an act perfectly legal. It is shown that, had she not thus purchased the property, the plaintiffs in the execution would have themselves become the purchasers. The note sued on was therefore given for a valid legal consideration, the price of the property purchased by her, and not simply for the debt of her husband as alleged. The fact that the price was appropriated to the payment of her husband's debt does not affect her obligation to pay it.

We think, however, the husband is not bound on the note. He seems to have been careful to explain the capacity in which he signed the note, and there is nothing in the written agreement between the parties and the two notarial transfers of the note in suit from the payee to one A. Levy; and from the latter to plaintiffs, to show that he was held liable. On the contrary, they indicate that Mrs. Barrow alone was to pay the price. The transfers above alluded to describe the note as "made by Eleanor E. Barrow, and authorized by her husband, John J. Barrow." The words, "we jointly and severally promise," are controlled by the restricted signature of John J. Barrow, and the title of plaintiffs confirms this restriction.

This view of the case renders it unnecessary to inquire into the character of the debt due by the tutor to his wards. The consideration of the note sued on, being a part of the price of the property purchased by the maker, is valid and legal, and she has no interest to inquire into the validity of the debt for which said property was sold.

It is therefore ordered that the judgment, as against John J. Barrow, be reversed, and that there be a judgment in his favor against plaintiffs, and that in other respects the judgment appealed from be affirmed, with costs.

No. 3132.—*AR. MILTENBERGER v. JOHN R. TAYLOR, Executor.*

The authority of an executor to carry on a plantation, furnish it with supplies, etc., must be shown; otherwise the estate is not liable for the supplies furnished by a merchant under his direction.

APPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. Ryan & White*, for plaintiff and appellee. *T. C. Manning*, for defendant and appellant.

Howe, J. This action was instituted against the defendant as executor of Carey H. Blanchard, deceased, to recover the amount of

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two accounts, the one against "Blanchard & Bro.," the other against "Estate C. H. Blanchard."

The defense was a general denial, prescription of three years and a special denial of the liability of the estate of C. H. Blanchard.

There was judgment in favor of plaintiff for a part of the claim, the sum of \$3574 95, with interest from August 13, 1867, being the amount of the second account. The defendant has appealed.

A large portion of the plaintiff's claim appears to be prescribed; the whole of the account "A" against "Blanchard & Bro.," and a part, at least, of the account "B."

The amount for which the court below gave judgment is made up of items dating from November 10, 1865, to August 13, 1867. Carey H. Blanchard, whose executor is the defendant in this case, died in 1861. There is the usual testimony as to the correctness of the account, it being chiefly for supplies to the plantation; but by what authority the defendant, as executor, was carrying on, in 1866 and 1867, the plantation of a man who died in 1861, does not appear. The record does not justify us in affirming the judgment. See *Carroll v. Davison*, lately decided; also, *Woodbridge v. Pope*, 22 An. 293; *Succession of Decuir*, 22 An. 372; *Bank v. Dejean*, 12 R. 16.

It is therefore ordered that the judgment appealed from be avoided and reversed; that as to the account "A," for the sum of \$2066 91, there be judgment in favor of defendant; that as to the account "B," for which there was judgment in the court below for \$3574 95, the claim of plaintiff be dismissed as in case of nonsuit; and that the plaintiff pay costs of both courts.

No. 3138.—*MCDONALD & Co. v. J. WELLS, Curator, etc.*

The testimony of a witness residing out of the State, when taken before a notary public of the place where the witness resides, under a commission from the court directed to any notary public in said county where the witness resides, is inadmissible in evidence until the capacity of the notary who takes it is duly shown in the mode provided by law. The certificate of the county clerk of the county, where the notary resides, is not sufficient attestation of his capacity as notary to authorize the courts of Louisiana to receive the testimony taken under a commission which does not name the commissioner.

A PPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. H. S. Losee*, for plaintiffs and appellants. *Ryan & White*, for defendant and appellant.

HOWE, J. This suit was brought to recover from the curator of Mrs. Martha L. Wells, an interdicted person, a bill for board, medical attendance and clothing furnished to her as an inmate of a private asylum for the insane. Upon the trial of the case and of a rule to show cause why the commission issued to take testimony in Flushing, Queens county, New York, should not be used on such trial, the

 McDonald & Co. v. Wells, Curator, etc.

defendant made several objections to the use of the testimony thus taken. The objections were in time, for the rule was returnable on the day of trial. The only objection which had any merit was that the official character of the person before whom the testimony was taken, was not properly established, he being ostensibly a notary public in Queens county, New York, and the certificate of this fact being made only by the clerk of that county. This certificate was not sufficient as evidence in Louisiana, the commission having been directed "to any notary" and not to the notary in question by name. 5 N. S. 460; 4 La. 119; 5 La. 265; 13 La. 362; 4 An. 557. A simple method of authentication in such a case (which is entirely governed by the law of the State) is provided by statute. R. S., 1870, sec. 598.

The case for plaintiffs is not fully made out without the testimony thus erroneously admitted, and the judgment in their favor must be reversed.

It is therefore ordered that the judgment appealed from be reversed and the cause remanded for a new trial, and that plaintiffs pay costs of appeal.

No. 3158.—ORENS CAPMARTIN v. POLICE JURY, parish of Natchitoches.

Notes, given by the Police Jury without an ordinance of that body authorizing their issue, impose no legal obligation on the parish to redeem them.

An ordinance of the Police Jury, passed subsequent to the issuing of notes, authorizing their issue, will not render valid those notes which were issued without the authority of the ordinance and before it was passed.

Under the act of 1853, the Police Juries are prohibited from contracting a debt against the parish they represent without providing in the same ordinance for the payment of the principal of the debt so contracted. Therefore, the notes authorized to be issued by ordinance of the Police Jury, can not be enforced against the parish, if the ordinance that authorizes their issue, does not provide the means for paying the principal and interest on such notes.

A PPEAL from the Ninth District Court, parish of Natchitoches. *Osborn, J. Chaplin, Morse & Chaplin*, for plaintiff and appellee. *O. A. Bullard and J. M. B. Tucker*, for defendant and appellant.

WYLY, J. The plaintiff alleges that the parish of Natchitoches is indebted to him twenty-one hundred and eighty-five dollars, with five per cent. per annum interest thereon from judicial demand for this, that he is the holder and owner of thirty-five notes issued by the Police Jury of said parish, dated Natchitoches, Louisiana, August twelfth, 1862, each for the sum of five dollars, each payable to bearer in current funds, and each signed by P. M. Backen, President of the Police Jury, B. J. Bouis, Clerk, and paraphed, "Receivable for all parish dues, parish taxes of 1861, 1862 pledged;" that the petitioner is also the owner and holder of one hundred and sixty-one promissory notes, also made by the said Police Jury, dated Natchitoches, Louisiana, August

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the twelfth, 1862, each for the sum of ten dollars, each payable to bearer in current funds, and each signed by P. M. Backen, President of the Police Jury, B. J. Bouis, Clerk, and paraphed, "Receivable for parish dues, parish taxes of 1861, 1862 pledged;" that the petitioner is also the owner and holder of forty promissory notes made by the said Police Jury, dated Natchitoches, Louisiana, January 6, 1863, each for the sum of ten dollars, each payable in current funds, and each signed by P. M. Backen, President of the Police Jury, B. J. Bouis, Clerk, and paraphed, "Receivable for all parish dues, parish taxes of 1861, 1862 pledged."

The prayer of the petition is for judgment against the parish of Natchitoches for said \$2185 with interest and costs.

The defense is the general denial, an averment that the notes sued on were issued in aid of the rebellion; that the Police Jury had no authority to issue said bills or notes, because such power had not been given them by the State; that they were intended, as "bills of credit," to circulate as money, which the State itself was prohibited from issuing by the Constitution of the United States.

The court gave judgment for the plaintiff and the defendant has appealed. The prescription of five years urged in the brief was not pleaded in the court below, and it has not been filed in this court; however applicable it may be to most of the notes sued on, we are not permitted to supply the plea which the parties have not seen fit to file.

The defense that the Police Jury had no authority to create the indebtedness evidenced by the notes sued on, urged by the defendant, we think, is well taken.

The notes seem to have been issued without any ordinance whatever of the Police Jury. There is, however, in the record, the copy of an ordinance allowing the issuance of notes of the character before us, but this ordinance was passed subsequent to the issuance of these notes. But if they had been issued under the ordinance in the record, they are illegal, because that ordinance creating the debt does not provide "the means for paying the principal and interest of the debt so contracted." Acts 1853, 234.

Police Juries are the creatures of the Legislature, and their powers are limited. They can not bind the parish by their acts or contracts further than they are permitted to do so by express law. We know of no law which permitted the parish of Natchitoches to issue the bills or notes sued on, and which for a time were circulated in that parish as bills of credit or money. The judgment appealed from is erroneous.

It is therefore ordered that the judgment of the court *a qua* be set aside and annulled, and that there be judgment for the defendant; plaintiff paying costs of both courts.

Widow Louis Delacroix v. Mary M. Hart—Martha J. Barrow, Garnishee.

No. 3219.—Widow LOUIS DELACROIX v. MARY M. HART.—MARTHA J. BARROW, Garnishee.

No judgment can be legally rendered against the wife on interrogatories that have been served on her as garnishee, until she has been authorized by her husband or the judge to appear and make answer to the interrogatories. A judgment taken against her, *pro confessis*, without her being properly authorized, is null.

APPEAL from the Fifth District Court, parish of Iberville. *Posey, J. S. Matthews*, for plaintiff. *Barrow & Pope*, for garnishee and appellant.

HOWELL, J. Mrs. Martha J. Barrow, a married woman, has appealed from a judgment recovered against her as garnishee under a garnishment process issued upon a writ of *feri facias* herein, and urges as error that she was not authorized by her husband or the court to appear and stand in judgment.

A careful examination of the record shows this error to exist. No writ or process of any kind was served upon the husband; no order was made to authorize Mrs. Barrow to stand in judgment, and her husband made no appearance to authorize his wife, until they both appeared to ask for an appeal from the judgment rendered upon interrogatories taken *pro confessis*.

The case must be remanded, to enable the plaintiff to remedy the defect. As the appellant was not properly before the court, we can not pass on any other questions presented.

It is therefore ordered that the judgment appealed from be set aside and this cause remanded to the lower court, to be proceeded with according to law; plaintiff and appellee to pay costs of appeal.

No. 3175.—GEO. H. SALLIS v. MCLEARN & MASON.

An injunction will not lie to stay the execution of a judgment on the allegation that the judgment has been novated by giving a note, if the evidence shows that the note was placed in the hands of the judgment creditor before the judgment was obtained and that the judgment creditor has offered to return it before execution was ordered. In such a case, the injunction will be dissolved, with damages against the plaintiff in injunction and his surety on the bond *in solido*.

APPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. W. A. Seay*, for plaintiff and appellee. *H. S. Losee*, for defendants and appellants.

HOWELL, J. On the twenty-ninth February, 1868, the defendants herein obtained judgment, on the confession of the plaintiff, dated eighteenth December, 1867, for \$2512 40, with eight per cent. interest from nineteenth March, 1867, subject to a credit of \$711 17 on first January, 1868. A further credit of \$601 was indorsed on this judgment on seventh March, 1868, and on twenty-sixth May, 1870, the

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plaintiff obtained an injunction against the execution of a *feri facias* upon the balance, on the allegation that the judgment had been novated by a note given by him to the defendants, and which had passed into third hands.

The defendants allege that the note referred to was given by the plaintiff before he confessed judgment, was afterwards tendered to him by their attorney, and they now tender it in court.

On the trial, said note was tendered and filed in open court, and it was shown that council offered it to plaintiff before issuing execution. It is dated first December, 1867, and due at twelve months, for \$1410, with eight per cent. interest from date until paid. No other note is shown to have been given by the plaintiff, and if this be the one relied on by him as novating the judgment, he is mistaken. It is anterior to the date of his confession and the payment of \$601 in March, 1868, and does not correspond with the balance due on the judgment. It seems probable, as stated by one of the defendants, that it was taken in prospect of obtaining a judgment on the debt. However this may be, as it is surrendered to the plaintiff on a judicial admission by defendants that it no longer binds him, he has no cause to complain, and defendants are entitled to a dissolution of the injunction and the execution of their judgment.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, dissolving the injunction herein, and that plaintiff and his surety be condemned, *in solido*, to pay ten per cent. on the amount of the judgment enjoined with costs in both courts.

No. 3159.—PAULINE FLANNER v. AMBROISE LECOMPTE and S. PARSONS, Sheriff.

If prescription has been acquired in favor of an estate, parol evidence will not be admitted to show an interruption, nor will the written acknowledgment by the executor, made after prescription has been acquired, be allowed to establish an interruption. 21 An. 373. When, therefore, a judgment has been rendered against a party in his individual capacity and as executor of his co-debtor, and the proof shows that the written acknowledgment by the executor of the obligation of his co-debtor was not made until after prescription was acquired, then, and in that case, the injunction against the seizure on the judgment thus rendered will be perpetuated in so far, as the estate is concerned, on the ground and for the reason that the debt was prescribed as against the succession.

APPEAL from the Ninth District Court, parish of Natchitoches. *Osborn, J. H. Safford*, for plaintiff and appellee. *Pierson & Levy*, for defendants and appellants.

Howe, J. The injunction obtained by plaintiff should be maintained in part, viz: as to the undivided half of the tract of land about to be sold by defendants, which belongs to the succession of Eleazar

Flanner v. Lacompte and Parsons, Sheriff.

L. Hyams. The mortgage note held by defendant, Lecompte, was clearly prescribed before the written acknowledgment made by Samuel M. Hyams, executor, in January, 1866. The executor had no authority to renounce an acquired prescription. 21 An. 373.

The note, as to the other maker, Samuel M. Hyams, seems to have been kept alive by repeated acknowledgments, so that prescription as to him was never acquired.

There is no force in the objection of plaintiff to oral testimony to prove these acknowledgments, it appearing that at the time of trial S. M. Hyams was also deceased. The Statute of 1858, page 148, prohibits the reception of such testimony "against a succession." This contest is between two creditors, their claims, respectively, against the succession having been closed some years ago by judgment. Nor can the objection of plaintiff to the testimony of Mrs. Mary E. Hyams, the widow of S. M. Hyams, as to acknowledgments by him, be maintained. She was not testifying for or against her husband, but in behalf of one creditor against another.

It is therefore ordered that the judgment appealed from be reversed. It is further ordered that there be judgment in favor of plaintiff, perpetuating the injunction issued herein, so far as to restrain the sale by defendant, Lecompte, under his judgment, of that undivided portion of the tract of land, described in the petition and exhibits, which belongs to the succession of Eleazar L. Hyams. It is further ordered that in other respects the said injunction be dissolved; that the defendants pay the costs of the lower court and the plaintiff those of the appeal.

No. 3197.—STATE OF LOUISIANA v. GEORGE W. CLARK, alias BIOSSAT.

The objection by the accused that he was not served with a true copy of the venire and indictment, is not good ground for a motion in arrest of judgment.

A PPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. S. Belden*, Attorney General, for the State. *M. Ryan* and *W. A. Seay*, for defendant and appellant.

HOWE, J. The defendant, having been indicted and tried for murder, found guilty without capital punishment and sentenced to hard labor for life, has appealed. There are no bills of exceptions in the record, nor any assignment of error. There appears to have been a motion filed in arrest of judgment. What disposition was made of it, does not distinctly appear and perhaps in strictness it might be deemed to have been abandoned. However, granting that it was urged and overruled, we see no error in the judgment. The motion was founded on the allegation that the prisoner was not served with a

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true copy of the *venire* and indictment. This was no ground for a motion in arrest. 8 Rob. 513. The record shows that the prisoner was duly served with copy of indictment and *venire* and does not show that he made any complaint in such form that we can pass upon it, until after conviction. 6 An. 690; 12 An. 679; 14 An. 667.

Judgment affirmed.

No. 3152.—AUGUSTE VOINCHE v. FIELDING EDWARDS.

An order given for the price or value of a lot of cotton, together with the judicial admission made by the party who gave the order, in a suit for the recovery of another lot, which includes the lot for which the order is given, is sufficient to establish that the cotton for which the order was given, was in the possession of the person who gave the order for the payment of its price. Under this showing, the person giving the order for the payment of a certain lot of cotton can not escape his liability for the price on the ground that it was shipped to another house or establishment without his knowledge or consent, and that he is not, therefore, liable.

APPEAL from the Seventh District Court, parish of Avoyelles.
 A Miller, J. Taylor & Irion, for plaintiff and appellee. Waddill & Barbin, for defendant and appellant

HOWELL, J. Plaintiff claims of defendant the sum of \$2086 25, upon the following order:

“NEW ORLEANS, May 20, 1865.

At sight, please pay to Mr. Voinché or order the net proceeds of eighteen bales of cotton I have in your hands, nine bales of which are marked thus: ‘A Voinché,’ and nine bales marked ‘A. V.’

F. EDWARDS.

To C. A. WEED & Co.

New Orleans, corner Common and Tchoupitoulas streets.—The weight of the eighteen bales is 8200 pounds

(Indorsed) New Orleans, May 20, 1865.

Pay to the order of Thomas C. Payan.

THOMAS C. PAYAN.”

The defendant answers, substantially, that he never had possession or control of the cotton; that it was shipped to his commission merchants, C. A. Weed & Co., without his knowledge or consent, by one Todd, who represented himself as his agent; that he never received the amount of its sale or that of his own cotton sold by said Weed & Co.; that he has instituted suit against them for said cotton, but is not responsible to plaintiff. From the judgment against him he has appealed.

A careful examination of the evidence does not bring us to a different conclusion from that arrived at by the district judge.

After giving the above order, the plaintiff instituted suit against C. A. Weed & Co. for \$17,000, value of one hundred and twenty-seven bales cotton, including the eighteen bales involved in this controversy,

Voïnoche v. Edwards.

and introduced proof that he had, through one Todd, shipped said cotton to Weed & Co. in a lot of forty-one bales, on which, at a date after it was received by them, he was entitled to supplies to the amount of \$700, besides what had been advanced. The order itself recognizes his control and ownership of the cotton, and the evidence introduced by him in this suit does not countervail his judicial admissions and the effect of the orders.

We will here remark that the ground for the motion to dismiss this appeal is insufficient.

Judgment affirmed.

No. 3163.—WILLIAM V. KEARY et al. v. SYLVERT DUCOTE.

Parol evidence is inadmissible to prove an agent's authority to sell immovables. Buildings and other constructions attached to the soil are immovables by their nature. C. C. 464. Therefore, in a suit to cause the return of a building that has been demolished and removed, parol evidence will not be admitted to show authority in the agent of the owner to sell, nor to show a sale from the agent.

APPEAL from the Seventh Judicial District, parish of Avoyelles. *Miller, J. Irion & Thorpe*, for plaintiffs and appellees. *Edwards & Ducoté*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs sue the defendant for a house which, they allege, he demolished and removed from their land, upon which it was erected, to his own premises, where it was reconstructed. They pray that defendant be required by decree of the court to restore the building to them and to pay them five hundred dollars for its wrongful use; two hundred and fifty dollars, the cost that would necessarily be incurred by them in removing it from defendant's land and rebuilding it on their own; and, in default of defendant's restoration and delivery of the house to them after judgment, that he be condemned to pay them the value thereof, viz: five hundred and fifty dollars and costs, etc.

The answer is a general denial. The defendant avers that he bought the property in controversy and which he calls a "common shed" from one Melina Brownson, who was living in the house when he purchased it and who represented to him that she was authorized to sell it. The defendant pleads the prescription of one, two and three years. There was judgment rendered in favor of the plaintiff, responsive in the main to the prayer of the petition, and the defendant appeals.

On the trial of the case the defendant offered to prove by the testimony of two witnesses the sale of the house to him by Melina Brownson and also her authority to sell as agent of the owners. This was objected to on the ground that parol evidence is inadmissible to

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prove authority to sell real estate and immovable property. The objection was sustained and the defendant reserved a bill of exceptions. We think the evidence offered was properly rejected. "Lands and buildings or other constructions, whether they have their foundation in the soil or not, are immovable by their nature." C. C., art. 464. Transfers of immovable property must be in writing. C. C. 2275. Parol evidence is inadmissible to prove an agent's authority to sell immovables. 9 An. 178. The plea of prescription can not avail. The action is not for damages. The plaintiffs sue to recover property. The building was removed in the year 1865 or the year 1866. Citation in the present suit was served in December, 1869. The judgment of the court *a qua* decreed the plaintiffs to be the owners of the house and ordered, in the alternative, that the defendant restore the building or pay the plaintiffs the value thereof, viz: one hundred and twenty-five dollars and one hundred and fifteen dollars for the use and detention of it. It further ordered the defendant to pay the sum of two hundred dollars to cover costs of removing and replacing the building in its former position on Bayou du Lac. We think the court erred in awarding the last named sum for covering costs of removal.

It is therefore ordered, adjudged and decreed that the judgment of the district court so far as it decrees the defendant to pay two hundred dollars as cost of reinstating the building upon the land of the plaintiffs, be annulled, avoided and reversed. It is further ordered that in all other respects the judgment be affirmed, the plaintiffs and appellees paying costs of this appeal.

 No. 2686.—MARIA T. TRUDEAU v. JULIA C. ROW et al.

A married woman is not personally liable on a note executed *in solido* with her husband, when at the time of its execution a community of acquets existed between her and her husband and the latter had the exclusive administration of her paraphernal property. Where there is a community of acquets, and the husband has the exclusive administration of the paraphernal property of the wife, purchases made during the marriage fall into the community, and debts contracted, whether by the husband or the wife, are community debts, and must be discharged by the husband.

APPEAL from the Seventh Judicial District, parish of West Feliciana. *Miller, J. W. D. Winter, Thomas Butlar and Collins & Leake*, for plaintiff and appellee. *Wickliffe & Fisher*, for defendants and appellants.

TALIAFERRO, J. The defendant and her husband, John S. Row, are sued on a promissory note executed by them in favor of L. H. Trudeau or order for \$1781 66, dated fifteenth April, 1867, and due first March, 1868.

Separate answers were filed. The wife denied specially that she is bound by her signature to the note, having signed it through error

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and at the instance of her husband; that the consideration for which it was given, did not inure to her benefit individually nor to the benefit of her separate estate.

The husband's answer is a general denial, and an averment that the plaintiff is not the owner of the note sued on.

Judgment was rendered against Mrs. Row for \$876 22, with eight per cent. interest from fifteenth April, 1867, until paid, and against John S. Row for the amount of the note, with the same interest from the same time. The wife alone appealed.

The indebtedness for which the note was given was for merchandise of various kinds, chiefly dry goods such as are usually required for the use of families. The goods were purchased by Row and wife indifferently, sometimes by the husband, at other times by the wife, and occasionally by both together. The accounts were kept in the name of the husband alone. The purchases were made from L. H. Trudeau, since deceased, who kept a store in the parish of West Baton Rouge, where the debt was contracted, which was made on running accounts during parts of the years 1861 and 1862.

It appears that Mrs. Row and a sister of hers were the only heirs of their father, J. H. Collings, who owned a plantation on Poydras Bayou, in the parish of West Baton Rouge. Against the estate of Collings L. H. Trudeau had an account also, which amounted to \$294 19. This entered into, and made a part of, the amount for which the note sued on was given. The plantation of J. H. Collings, after his decease, was in charge of a manager until Row and his family went upon it to reside, which was about February, 1862. They resided there until the close of that year. This place was under the control and administration of John C. Row, the husband, who ran the saw mill on the place in connection with another person. It is not shown that he owned any property or controlled any other than that belonging to his wife and her sister, derived to them from the succession of J. H. Collings.

The plaintiff's ownership of the note on which this suit is founded, is fully established.

Under the state of facts shown by the record, we do not see how the plaintiff can recover against the wife. It is not alleged or shown that she is separate in property from her husband. Neither does it appear that she had the administration of her paraphernal property. On the contrary, it is established that the only property she owned was managed solely by her husband; the accounts of Trudeau were all made out in his name. In like manner, purchases of things not included in the accounts were made by him in his own name and on his own account; in one case, he purchased from Trudeau an engine boiler which was placed in the saw mill on the place on Bayou Poydras. It is well settled that in such cases debts, contracted in the manner these

Maria T. Trudeau v. Julia C. Row et al.

were, are community debts, whether contracted by the husband or the wife, and that the husband is alone responsible for them. The case of *Wyly v. Hunter*, 2 An. 806, is very closely in point with the one under consideration; and so also is that of *Scanlan v. Warinck*, 10 An. 30; also *Kelly v. Robertson*, 10 Rob. 303; Civil Code, article 2412.

None of the articles entering into these accounts are shown to have been such as the husband was not bound to furnish, or that they went to the benefit of her separate estate. See 8 An. 512; 10 An. 554; 14 An. 169.

It is therefore ordered, adjudged and decreed that the judgment of the district court, so far as it relates to the defendant, Mrs. Julia C. Row, be annulled, avoided and reversed; that she be released from the obligation upon which the suit was brought; that the judgment, as rendered against her husband, John S. Row, remain undisturbed, and that the plaintiff and appellee pay costs of this appeal.

No. 3151.—J. A. BLANC, Syndic, v. FRED. HERTZOG and AMIRE HERTZOG.

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Prescription is interrupted on a note so long as the holder is in possession of collaterals pledged by the maker to secure its payment.

An order or draft given on another, not negotiable in form, for the accommodation of a third party, without consideration, can not be enforced against the maker, even if it be in the hands of a pledgee. In such a case the pledgee would have no other or greater rights than the original payee himself would have.

A PPEAL from the Ninth District Court, parish of Natchitoches. *A. Osborn, J. Pierson & Levy*, for plaintiff and appellee. *O. F. Dranguet and Jack & Pierson*, for defendants and appellants.

HOWELL, J. Plaintiff, as syndic of B. Toledano & Taylor, sues the defendant, F. Hertzog, on a note made by Hertzog Brothers, of which firm he was a member, and Mrs. Amire Hertzog on a draft drawn by her in favor of Hertzog Brothers on Ar. Miltenberger, but not accepted, for the amount due on the note of said Hertzog Brothers and for which it was pledged as collateral security. She excepted to bringing suit in the same action, the obligations, if any, being exclusive and independent and there being no privity of contract between the defendants. The exception was overruled and each defendant filed separate defenses. That of Frederick Hertzog was a general denial and the prescription of five years; and that of Mrs. Amire Hertzog was, in substance, that she gave the order to Hertzog Brothers solely for their benefit and accommodation, they being her sons, and not as commercial or negotiable paper, to be paid on the sale of her then growing crop, which was destroyed by the Confederate army without any fault on her part, and that she never recovered any value for said order. Judgment was rendered in favor of plaintiff and defendants appealed.

Blanc, Syndic, v. Fred. Hertzog and Amire Hertzog.

As to Frederick Hertzog the case is fully made out. Prescription may be considered suspended as to him, while the creditor held the collateral pledged by him. The case is different, however, in regard to Mrs. Hertzog. The order given by her was not negotiable or commercial paper and was without consideration. The pledgee, therefore, acquired no greater right than the payees had, and they could not have recovered on it. And, besides, it is not shown to have been presented for payment and notice of non-payment given to the drawer. We think she is not liable on the order, and that it is unnecessary to inquire into the regularity of the action.

It is therefore ordered that the judgment, as to Mrs. Amire Hertzog, be reversed, and that there be judgment in her favor against the plaintiff, and that the judgment against Frederick Hertzog be affirmed, with the costs of appeal.

No. 3217.—JULIA A. DIXON, Executrix, v. T. H. D'ARMOND.

To give effect to a testament, made in another State of the Union, on property situated in this State, the testament must be registered and its execution ordered by the judge having jurisdiction over the place where the property is situated. C. C. 1688-9.

The order of the judge, admitting a will made in another State to registry and directing its execution, necessarily vacates the former order of the same judge appointing an administrator to take charge of the property situated in this State.

APPEAL from the Parish Court of East Feliciana. *Boedicker*, Parish Judge. *Kernan & Lyons*, for plaintiff and appellee. *Cross & Hardee* and *Race, Foster & E. T. Merrick*, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment recognizing and confirming the plaintiff, as testamentary executrix in Louisiana of the last will of B. F. Dixon, who died at his residence in Mississippi, already duly registered and its execution ordered, directing letters testamentary to issue to her on her taking oath and giving bond, and rescinding the order appointing him administrator of the succession of said deceased in the parish of East Feliciana.

According to articles 1688 and 1689 of the Code of 1870, section 1460 of Revised Statutes of 1870, and the decisions in 17 La. 486; 18 La. 570; 2 R. 427; and 13 La. 224, it was the duty of the probate judge, upon due application, to cause the will from Mississippi, duly proven, to be registered here, its execution ordered, and the testamentary executrix named in it to be recognized and letters testamentary issued to her upon taking oath and giving bond. Such an order would necessarily supersede the appointment of an administrator appointed here.

Judgment affirmed.

No. 3147.—STEWART, HYDE & CO. v. BUARD & DRANGUET.

A stipulation in a contract between a planter and a commission merchant, by which the former agrees to secure the latter in a certain amount in any event, is not illegal, and may therefore be enforced against the planter, notwithstanding he has failed to make a crop.

Where no stipulation for interest is made in the agreement, only legal interest can be recovered on the amount found to be due. The fact that a note pledged as collateral security bears eight per cent. interest per annum, does not entitle the creditor to that rate of interest on an obligation that only draws five per cent.

A PPEAL from the Ninth District Court, parish of Natchitoches.
Osborn, J. O. Chaplin & Son, for plaintiffs and appellants.
Pierson & Levy, for defendant and appellee.

Howe, J. In the early part of 1867, the defendants entered into a contract with the plaintiffs, which was afterward reduced to writing and signed by defendants, by which the plaintiffs, as commission merchants and factors, were to furnish plantation supplies to an amount not to exceed \$6000, and the defendants, planting partners, agreed to ship to plaintiffs the entire crop of their plantation, "which," to quote from the agreement, "the said Buard & Dranguet warrant to amount to four hundred bales of cotton, of four hundred and fifty pounds to the bale, and if the number fall short of that number, the commission shall be paid upon the deficiency at the rate of five dollars per bale, liquidated amount."

To secure payment of the advances, interest and charges on the crop, the defendants furnished their joint note for \$8000, due December 31, 1867, and each pledged as collateral certain mortgage notes; and both defendants also agreed to pay five per cent. attorney's fees on any balance due and sued on. The defendants having failed to make a crop, suit was brought against them and judgment obtained against Buard at the January term, 1869, of the district court, for the sum of \$4000, being one-half of the plaintiffs' account. The case was continued as regarded Dranguet, the other defendant, and at the December term of court, 1869, judgment was rendered against Dranguet for \$2530 49. From that judgment the plaintiffs have appealed, and now ask for a reversal and amendment, decreeing the liability of the defendant in the full amount asked for in the petition.

The defendant resists this demand on the following grounds:

First—He denies having entered into the contract at the date stated, but avers that he signed the same, having been compelled to do so from the force of circumstances, and that the contract is usurious and an extortion.

Second—He admits the indebtedness for one-half the supplies furnished, but objects to the commission on cotton not shipped, as contrary to law.

Third—He alleges error in the mortgage given as collateral, which he says should have been only for \$3000.

Fourth—He pleads in compensation the one-half value of four mules, worth, as he alleges, in the aggregate \$600, returned to plaintiffs, and the sum of \$100 for their hire.

Fifth—He pleads also in his amended answer that the rate of interest should be only five per cent., and reiterates the illegality of the contract entered into to pay five dollars per bale as commission on cotton which they guaranteed to ship.

First—The evidence shows that the contract was voluntarily executed by the defendant, Dranguet, as well as by Buard. The negotiations commenced in New Orleans by conversations between the plaintiffs and Buard, and afterwards with Dranguet. The within agreement was afterwards prepared and sent up to the plantation. The defendants returned it with a letter, dated March 1, 1867, objecting to the portion in regard to a commission on cotton not shipped and threatening to settle for supplies already received, and, we presume, find some other factors. To this plaintiffs replied by letter of March 25, 1867, arguing the matter at length and intimating that, if the defendants did not choose to sign the agreement, they were at perfect liberty to withdraw from the arrangement and find other factors upon paying for what supplies they had actually received. Thereupon the defendants both signed the agreement and acknowledged it to be their voluntary act before a notary, and it was recorded May 16, 1867. The defendant, Dranguet, testified that he was forced to sign it by the fact that the poverty of his partner prevented the latter from settling his share of supplies in March, 1867, and withdrawing from the arrangement, and therefore he, Dranguet, did not settle and withdraw. We see nothing in this testimony or in the record elsewhere to invalidate the written, signed and recorded contract.

Second—The agreement being established, it seems to follow that the clause quoted above, by which defendants warranted the crop to be four hundred bales, and agreed, in effect, that the plaintiffs should have \$2000 commission in any event, is binding on the appellee, Dranguet. The contract may have been rash, but it was not unlawful; nor was it without consideration. The facts cited already clearly show that the plaintiffs would not furnish the advances and supplies, and take the risks of what afterwards proved to be a total failure of the crop, without this special clause. In this respect the case differs from *Taylor v. Wooten*, 19 La. 518.

Third—The point of error as to the amount of the collateral mortgage note seems to be abandoned.

Fourth—The evidence shows that the defendant, Dranguet, is entitled to credit for one-half the value of the four mules returned, which one-half we fix at \$200.

Fifth—The plaintiffs, in the absence of any agreement to pay eight

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per cent. interest, are only entitled to recover five. The fact that one of the collaterals bears eight per cent. interest, can not affect the question. The agreement and the principal note of \$8000 make no provision for any more than the legal rate.

We compute the amount due by Dranguet to be \$3440, with five per cent. interest from July 31, 1867, and five per cent. attorney's fees.

It is therefore ordered that the judgment appealed from be reversed, and that the plaintiffs, Stewart, Hyde & Co., recover from the defendant, C. F. Dranguet, the sum of three thousand four hundred and forty dollars with legal interest from July 31, 1867, and the further sum of one hundred and seventy-two dollars and twenty cents, attorney's fees and costs of both courts, with recognition of the special mortgage on the property mentioned in the petition and in the act of mortgage on file, with right to seize and sell the same.

No. 3146.—ELEANOR E. BARROW v. AMANDA R. RICHARDSON.

An affidavit, though legal in form, is void if it be shown that the affiant was not sworn by an officer competent to administer oaths.

If it be shown that the party claiming the injunction was not present and did not take the oath, as certified by the clerk who issued the writ, it will be dissolved and set aside, because no affidavit has been made, as required by law.

A PPEAL from the Seventh District Court, parish of West Feliciana. *Cooley, J. Collins & Leake*, for plaintiff and appellant. *McVea & Kilbourne*, for defendant and appellee.

TALLAFERRO, J. The defendant having seized under execution the property of the plaintiff, the latter took out an injunction to restrain the sale, alleging that the judgment under which the execution was issued, is invalid; that the note and mortgage upon which the judgment is predicated, were given without any valid consideration, having been executed for a debt of her husband to the defendant, which plaintiff was in no manner bound for. She therefore prays to be relieved from the obligation thus contracted and that the injunction be perpetuated.

The defendant moved to dissolve the injunction on the following grounds:

First—The affidavit on which the injunction issued, is insufficient in this, that the plaintiff and affiant was not legally sworn; that no oath was ever administered to her; that she was not before or in the presence of the clerk of the court before whom it purports she was present, and by whom it is stated she was sworn.

Second—That the bond is insufficient in amount and not in compliance with law.

The injunction was dissolved on the first ground stated in the motion, and the plaintiff condemned to pay the defendant five hundred dollars, special damages. The plaintiff has appealed.

Eleanor E. Barrow v. Amanda R. Richardson.

The clerk, after writing below the name of the plaintiff, at the foot of the affidavit, the words "Sworn and subscribed to, this sixteenth of June, A. D. 1870," and subjoining his official signature, appears as a witness and swears that the affidavit was not signed in his presence; that he don't think he ever saw Mrs. Barrow; that he did not administer that or any other oath to Mrs. Barrow; that the affidavit was brought to him by one of the attorneys in the case who told him that Mrs. Barrow signed the affidavit.

This, we suppose, is a fair statement of the case, but it discloses a method of getting up affidavits, not contemplated by law.

Mrs. Barrow, the plaintiff, not having taken the oath required to enable her to obtain an injunction, her case fails. Code of Practice, art. 304.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

No. 3182.—WILLIAM L. WYNN v. ELIZA C. PATRICK, Executrix.

A third purchaser of promissory notes, after maturity, stands in no better position than the original owner. Therefore, if the facts show that the original maker received an illicit currency for the notes, the third holder, after maturity, can not recover, even though he show that the maker used the illicit currency which he received for them in the payment of a valid obligation.

APPEAL from the Fifth District Court, parish of West Baton Rouge. Posey, J. Favrot & Lamon and Clifford Belcher, for plaintiff and appellant. Clarke, Bayne & Renshaw, for defendant and appellee.

HOWE, J. This action was instituted against the executrix of J. C. Patrick upon two notes of the decedent. There was judgment in favor of defendant in the court below, and plaintiff has appealed.

The record clearly shows that Patrick made the notes in suit to the order and for the accommodation of A. D. Kelly & Co.; that A. D. Kelly & Co. pledged them to the Bank of Louisiana as collateral security for a loan by the bank of "Confederate money," and that, about three years afterwards, and long after maturity, they were purchased by the plaintiff from the bank.

It is certain that A. D. Kelly & Co. could not have successfully sued Patrick on these notes. It seems certain that, under the decisions of this court since 1865, the bank, giving nothing but Confederate paper for notes to which the obligations in suit were collateral, could not have recovered from Patrick on those collaterals. It follows that the plaintiff, purchasing long after maturity and legally put on his guard, can have no better rights than the bank.

It matters not that the Confederate notes, loaned to A. D. Kelly & Co. in December, 1861, and March, 1862, by the bank, on the pledge

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of the obligations in suit, were used by Kelly & Co. to take up previous valid obligations of the pledgers. The jurisprudence of the State on the subject is founded on the theory that Confederate notes were an illicit currency; that the dealings in them were *contra bonos mores*, and that the parties so dealing would be left by the court precisely where they had placed themselves. It is immaterial, then, what A. D. Kelly & Co. did with the reprobated currency which they received from the bank by discount on pledge of notes in suit.

Judgment affirmed.

Rehearing refused.

No. 3136.—J. C. VAN WICKLE, Executor v. MARY CALVIN.

A testamentary executor can not sue for the nullity of a sale of real property, made by the testator, on the ground that the sale is fraudulent and simulated and made for the purpose of defrauding the creditors of the deceased. The testamentary executor only stands in the place of, and represents, the testator; he can, therefore, bring no action; nor stand in judgment in any case where the testator, if alive, could not.

APPEAL from the Seventh District Court, Parish of Pointe Coupée.
 A Miller, J. Thomas H. Hewes, for plaintiff and appellant. W. D. Winter, for defendant and appellee.

HOWELL, J. The question in this case is whether or not a testamentary executor can sue to set aside, as simulated and fraudulent, an act of sale of real property made by the testator and have the property declared to belong to the succession upon the allegations that said sale was made to hinder and delay the creditors, the executor being one individually; that there are debts amounting to many thousand dollars, and that, although the deceased held a lucrative office, he, the executor, has been unable to find any money or obtain possession of any property whatever, except a small quantity of movables inventoried at about \$300.

We are of opinion that this question, as presented in this case, must be decided in the negative.

The plaintiff does not claim to act for, and in the name of, the creditors, but simply as executor of the last will and testament of the deceased, and without alleging that by the will he is vested with seizure of the property of the estate. In such capacity he can be considered only as standing in the place of the testator, and can only bring such actions as the latter could himself bring, and it is clear that the testator, if alive, could not maintain this action. The sale attacked is just as much the act of the deceased as the will through which the plaintiff desires his appointment and authority.

We conclude that the district judge did not err in maintaining defendant's exception.

Judgment affirmed.

Silliman et als. v. Mills et als.—Norwood, Third Opponent.

No. 3181.—WILLIAM SILLIMAN et als. v. JOHN Y. MILLS et als.—
JOSEPH E. NORWOOD, Third Opponent.

One mortgage takes rank over another by the priority of date of registry in the office of the Recorder of Mortgages where the property mortgaged is situated. The priority of date of registry gives the preference over the property mortgaged or the proceeds thereof, if it has been sold without reference to the character of the debt on which the mortgage is founded.

All exceptions to the form of the proceedings, if not pleaded in *limine litis*, are considered waived, if the case has been decided on general and special defenses without any action of the court on the exceptions.

APPEAL from the Seventh District Court, parish of Pointe Coupée.
Miller, J. Farrar & Montgomery, for plaintiffs and appellees.
Collins & Leake, for defendants and appellants.

WYLY, J. This is a contest between mortgage creditors for the proceeds of the sale of a plantation in the parish of Pointe Coupée and a rule to compel the sheriff to complete the sale of the property adjudicated to the plaintiffs, the seizing creditors, on the second day of May, 1868.

The contest for the proceeds is between the plaintiffs and the third opponent, the latter claiming part of the proceeds on the ground that he is a concurrent mortgagee.

The court, deciding that the mortgage of the opponent was inferior in rank to that of the plaintiffs, dismissed the opposition and ordered the sheriff to complete the judicial sale made on the second day of May, 1868, and to credit the amount of the bid on the writs of the plaintiffs in execution.

The third opponent has appealed.

It appears from the record that the mortgage foreclosed by the plaintiffs, and under which the plantation was sold, was recorded in the parish of Pointe Coupée, where the plantation is situated, twelve days prior to the registry of the mortgage of the third opponent in said parish.

It matters not what may have been the consideration of the mortgage of the third opponent or at what time it was executed, it only had effect as to the plaintiffs from the day of its registry in the parish of Pointe Coupée, and, this registry being subsequent to the plaintiffs', the mortgage of the latter is inferior in rank to the mortgage of the third opponent. The plaintiffs are therefore entitled to the proceeds of the sale.

We deem it unnecessary to consider the objections which are purely technical, and in which the third opponent is not interested, being a junior mortgage creditor; and we will not notice the issues raised in the amended answer of the opponent to plaintiffs' rule, because the same was disallowed by the court and no bill of exceptions was taken to said ruling.

Silliman et al. v. Mills et al.—Norwood, Third Opponent.

The objection that the sheriff returned the writs of execution after the adjudication without completing his return thereon, can not defeat the rights of the plaintiffs, it being the duty of the sheriff to retain certified copies on which to make his final returns, and he being presumed to have done his duty. Acts of 1855, approved March 15; C. P. 642.

The exception to the capacity of the executors of Silliman to file the rule to compel the sheriff to complete the sale, should have been pleaded in *limine litis* before issue joined, and it is considered waived by the general and special defences to the merits on which the case was determined, without any action of the court thereon. C. P. 333; 11 An. 688, 689; 18 An. 206, 207, and authorities cited.

It is therefore ordered that the judgment appealed from be affirmed, the appellant paying costs of appeal.

No. 3237.—J. R. JEFFREY & SONS v. W. D. PHILIPS.

23	207
115	644

Citation of appeal must be served on the appellee, if he resides in the State. C. P. 582. The appellee who resides in the State, can not be made a party to the appeal by service of citation on the attorney.

APPEAL from the Seventh District Court, parish of Pointe Coupée. Posey, J. Greaves & Dupree, for plaintiffs and appellants. Collins & Leake, for defendant and appellee.

WYLY, J. The motion to dismiss this appeal must prevail on the ground that the defendant, the appellee, was not cited; he being a citizen of this State can not be made party to the appeal by service of citation on his attorney. C. P. 581, 582; 21 An. 429.

It is therefore ordered that the appeal herein be dismissed at the costs of the appellant.

No. 2475.—LOUIS GAGNET v. THE CITY OF NEW ORLEANS.

The Supreme Court will not examine the question whether the act of 1858, authorizing the appointment of experts to determine the damages in certain cases, is in conflict with articles ten and seventy-three of the Constitution, which provide that the judicial power of the State shall be vested in certain courts and justices of the peace, if such objection be only urged in the answer, and the report of the experts is allowed to go before the court on the trial without objection. If the experts could not be judges on account of the sole judicial power being lodged elsewhere, still they might be witnesses, and their report, when received on the trial without objection, is entitled to consideration as evidence in the case.

APPEAL from the Fourth District Court, parish of Orleans. Theard, J. John Livingston, for plaintiff and appellee. George S. Lacey, city attorney, for defendant and appellant.

HOWE, J. The plaintiff, as lessee of the Carondelet Canal and Navigation Company, instituted this suit under the provisions of an

act of the Legislature, approved March 10, 1858, by which it was provided that, after the expiration of five years from the final passage of the act, the city corporation should be prohibited from draining into the Bayou St. John; and that, if the city should continue to drain into said bayou after the expiration of the term aforesaid, then only upon due indemnity being made for any injury which should be made to appear to result therefrom; said indemnity to be determined by three experts, to be appointed, one by the city corporation, one by the company and one by any of the district judges of New Orleans.

The plaintiff named his expert and prayed the court to name another, which was done. He prayed that these experts, together with one to be selected by the city, might be ordered to report the damages done to him by the acts of the defendant in draining into the bayou from March 10, 1868, up to the time of their report, and for judgment therefor and for all such relief as the nature of his demand might require.

The answer of the defendant was a general denial and a special averment that the act, No. 74 of 1858, under which suit was brought, was null and void, because in contravention of article sixty-one of the Constitution of 1852 and articles ten and seventy-three of the Constitution of 1868, which provide that the judicial power of the State shall be vested in certain courts and in justices of the peace. Without waiving this defence the defendant appointed an expert as requested by the petition.

The experts made a unanimous report, fixing the damages at \$500 per month from February 1, 1869, to July 1, 1869, or, in all, \$2500, and thenceforward at the same rate so long as the city should continue to use the bayou as a drain. Upon this report and the other evidence in the case the court *a qua* gave judgment in favor of plaintiff for \$2500, and ordered the city to cease draining into the bayou on the first July, 1869, or in default to pay plaintiff the sum of \$500 per month after July 1, 1869, so long as such draining should continue. The city appealed.

The report of the experts was received without objection. There is no bill of exceptions of any kind in the record. We do not perceive, therefore, the necessity of passing upon the question raised by the pleadings, whether the act of 1858, providing for the determination of damages by experts appointed in a certain way, is in conflict with those articles of our fundamental law which vest the judicial power solely in certain courts and justices. The experts could certainly be witnesses if they could not be judges, and their report, received without objection, has weight as testimony, even if it has no value as a quasi-judicial decision. It helps to maintain the judgment of the court, in which, save in one respect, we see no error.

Several interesting questions of the powers of the State over municipal corporations, of the servitude of drain, of vested rights and of navigable streams, have been raised by counsel for defendant in this court, but we do not feel authorized to pass on them in this record.

In one respect the judgment should be amended in favor of appellant, so as to limit the payment of indemnity to the term of the plaintiff's lease.

It is therefore ordered that the judgment appealed from be amended so as to limit the rights of plaintiff to a monthly payment of \$500 to the term of his lease, which expires April 26, 1878; that, as thus amended, the judgment be affirmed, and that appellee pay costs of appeal.

Rehearing refused.

No. 3174.—MARY V. PRICE, for Herself and as Tutrix v. SARAH P. CUMMINGS and JAMES CUMMINGS.

The judgment rendered in the court below, without the question of jurisdiction having been raised, is no bar to the action of nullity before the same court for the want of jurisdiction. Nor can the dismissal of the appeal by the Supreme Court for want of jurisdiction be urged as *res judicata* against the action of nullity in the lower court for want of jurisdiction there.

A PPEAL from the Ninth Judicial District, parish of Rapides. *Osborn, J. H. S. Losee*, for plaintiff and appellant. *B. A. Hunter*, for defendants and appellees.

TALIAFERRO, J. This is an action to annul a judgment rendered in an injunction suit, brought in the district court for the parish of Rapides in 1869 by the defendant, Sarah P. Cummings, to restrain the sale of certain lands upon which the plaintiff in the injunction suit alleged she was entitled to establish a homestead right. The ground upon which the plaintiff prays the judgment rendered in the injunction suit may be annulled, is, that the amount involved is less than five hundred dollars and, therefore, that the district court which rendered the judgment, was without jurisdiction. The defendant excepted to the petition on the grounds that, a judgment having been rendered in the injunction suit, on the same cause of action, between the same parties, and the present plaintiff having appealed to the Supreme Court, and her appeal being dismissed, the matters in controversy became *res judicatae*; and that the plaintiff alleges in this action causes of nullity which she might have set up in her defense in the injunction suit.

The exceptions were sustained by the court below and the suit dismissed, and from this judgment of dismissal the plaintiff appeals.

There is a motion to dismiss on the same grounds that were set up in the lower court. We do not concur with the judge *a quo* that the

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defendant can successfully set up the plea of *res judicata*. The appeal, taken by the present plaintiff as defendant in the injunction suit, was dismissed by this court on the ground of want of jurisdiction, the amount in controversy not exceeding five hundred dollars. In the injunction suit the question of the jurisdiction of the district court was not raised. The nullity of the judgment on that ground is the subject matter of the present suit. If the defendant in injunction had excepted to the jurisdiction of the district court and judgment had been rendered, as it was, against her, she clearly would have had the right to her action to annul. The fact that she appealed and the appeal was dismissed for want of jurisdiction in this court, places her in no worse position. We think the court erred in sustaining the exception.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance, to be proceeded with according to law, the defendant and appellee paying costs of the appeal.

No. 3196.—NEW ORLEANS CANAL AND BANKING COMPANY v. Mrs.
SOPHIA MARTIN.

If the plea of prescription be made for the first time in the appellate court and the record shows no interruption, the cause will be remanded, on the suggestion of the appellee, with instructions to the judge *a quo* to try the question whether there has been any interruption or suspension of prescription.

A clause in the judgment of the court below, which has been confirmed on default, granting a stay of execution for one year, does not debar the defendant and appellant from urging the plea of prescription in the appellate court.

APPEAL from the Ninth District Court, parish of Rapides. *Osborne, J. T. C. Manning*, for plaintiff and appellee. *Ryan & White*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment confirming a default against her and rendering executory the mortgage securing the instrument sued on.

She has filed in this court the plea of prescription, which, upon the face of the papers, seems to be an effectual bar to the recovery of the demand of the plaintiff. There is no interruption or renunciation of prescription shown, and we must conclude that the plea is well taken. As the plea has been filed in this court, and as the plaintiff has asked that the case be remanded if the plea should appear to be well taken, we will remand the case for the purpose of having it judicially ascertained whether there has been an interruption or renunciation of prescription.

The defendant is not estopped from pleading prescription in this court, as contended for by the plaintiff, because in the judgment con-

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firming the default there is a clause staying execution for one year. We can not say that a party who has entered no appearance and against whom a default has been confirmed, has done an act in the progress of a case in the court below estopping him from pleading prescription in this court.

It is therefore ordered that the judgment appealed from be annulled, and that this case be remanded for new trial, and to be proceeded in according to law and the views herein expressed. It is further ordered that appellee pay costs of appeal.

No. 3193.—LIZZIE TAYLOR, Administratrix, v. W. B. ROBERTSON
and Wife.

The stipulation in a note and act of mortgage that the maker could not be required to pay it until a certain judicial mortgage resting on the land was raised, can not be invoked to defeat the plea of prescription after the judgment from which the judicial mortgage springs, has been paid.

In this case the record shows that an injunction, which had been granted to stay the sale of the property under this judicial mortgage, had been set aside by a decree of the Supreme Court on the ground that the judgment had been paid. This decree of the Supreme Court was, however, not filed in the recorder's office until after prescription had accrued on the note. Held—That, if the decree of the Supreme Court annulling the judicial mortgage was not of itself sufficient notice to the holder of the note that it was due and exigible, yet it was the duty of the holder of the note and the vendor of the land to have the judicial mortgage on the land erased from the records so soon as the decree of the Supreme Court had declared it void; and therefore, if he, the holder, failed to have the judicial mortgage erased from the records, he was estopped by his own laches from invoking the failure to record the decree of nullity to defeat the plea of prescription of the note which had been allowed to prescribe in his hands.

A PPEAL from the Fifth District Court, parish of West Baton Rouge.
A Posey, J. Fuqua & Callahan, for plaintiff, and *Favrot & Lamon*, for defendant, W. B. Robertson, appellee. *Barrow & Pope*, for Mrs. M. J. Robertson, defendant and appellant.

HOWELL, J. This is a suit on a mortgage note, changed from the executory to the ordinary form, against W. B. Robertson, the maker of the note, and his wife, to whom the land mortgaged had been transferred in part payment of her judgment against her husband prior to these proceedings.

The prescription of five years is pleaded by both defendants, and in case this plea is not sustained, the wife abandons the property. From a judgment against the husband for [the amount of the note and against both recognizing the mortgage on said land, the wife alone has appealed.

The note was due on first January, 1859, and notice of the executory process was given to the debtor on eighth December, 1866. But plaintiff contends that prescription was suspended by a clause in said note and the act of mortgage by which it was stipulated that the maker of said note was not to pay the same and had the right to withhold the

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payment thereof until a certain judicial mortgage resting on the property was fully canceled and released.

This mortgage, it is contended, was raised by a decree of the Supreme Court, offered in evidence, which maintained an injunction against the execution of the judgment operating said mortgage, on the ground that said judgment was paid. This decree was recorded in the lower court on eleventh December, 1860. According to an indorsement on it, it was not filed in the recorder's office until first November, 1866. Plaintiff insists that prescription did not begin to run until this last date. In this view we do not concur. It was the duty of plaintiff's intestate, the holder of the note now in suit and the vendor of the land for the price of which it was given, to have said mortgage erased, and surely, when he was successful in the suit involving the validity thereof, he was in a condition to clear the records of the mortgage, even admitting the judgment of the Supreme Court, when final, did not have that effect, and his delay in doing so could not inure to his advantage on the question of prescription. When the said judgment of the Supreme Court became final, he could demand the payment of the note. The objection of plaintiff that this decree is not shown to be identified with the debt or mortgage referred to in the note, has no force. They seem from the record to be sufficiently connected. But if it were not so, there is yet no evidence that the mortgage is canceled, and, on plaintiff's theory, she would have no right to enforce payment in this suit. We think the note was prescribed when these proceedings were instituted.

It is therefore ordered that the judgment appealed from be reversed and set aside, so far as it affects the property of appellant, Mrs. Mary Jane Robertson, described in said judgment, and that there be judgment in her favor on plaintiff's demand for the seizure and sale of said property; plaintiff and appellee to pay costs of appeal.

No. 3246.—J. V. SEVIER v. SUCCESSION OF GORDON.

The district courts have no jurisdiction over the settlement of disputes purely probate in character. The parish courts have exclusive jurisdiction over such disputes.

APPEAL from the Thirteenth District Court, parish of Tensas. *Hough, J. J. W. Collier*, for plaintiff and appellee. *Farrar & Reeres*, for defendant and appellant.

Howe, J. The plaintiff, being a judgment creditor, proceeded by rule against the executor of Gordon to show cause why succession property should not be sold to satisfy that judgment. The rule was made absolute April 29, 1870, and the sale of succession property ordered in amount sufficient to satisfy the judgment of plaintiff. The executor has appealed.

Sevier v. Succession of Gordon.

The decree of the court below must be avoided for want of jurisdiction. The matter in dispute was probate in character; it concerned strictly the "settlement" of the succession and belonged to the parish court.

It is therefore ordered that the judgment appealed from be avoided and annulled and the rule dismissed, with costs.

No. 3108.—THE STATE OF LOUISIANA v. LAURENT FRANK.

In a criminal trial for a capital offense, the jurors are not permitted to separate; and if a separation takes place, misconduct and abuse will always be presumed and a new trial ordered.

23a	213
45	1177
23	213
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114	87

A PPEAL from the Fourth Judicial District, parish of St. Charles. *Beauvais, J. John A. Cheevers*, District Attorney, for the State. *R. King Cutler* and *F. B. Earhart*, for defendant and appellant.

WILY, J. On an indictment for murder the defendant was tried and convicted of manslaughter, and, being sentenced to the Penitentiary for ten years, he has appealed.

On a motion for new trial it was shown that there was a separation of the jury twice during the progress of the trial. In capital cases it is well settled, that jurors are not permitted to separate, and that upon a separation misconduct and abuse will always be presumed. *State v. Hornsby*, 8 R. 554; *State v. Crosby*, 4 An. 435; *State v. Evans*, 2 An. 321.

It is therefore ordered that the judgment appealed from be set aside and annulled, and that this case be remanded for new trial, and to be proceeded in according to law.

No. 3269.—STATE OF LOUISIANA ex rel. M. SCOLLER v. WM. H. COOLEY, Judge of the Sixth District Court.

An interlocutory decree, ordering interrogatories against a garnishee in an attachment suit to be taken for confessed, is not appealable until final judgment has been pronounced in the main action. A writ of mandamus will not, therefore, issue from the Supreme Court directing the judge *a quo* to grant an appeal from such interlocutory order.

A PPLICATION for a Writ of Mandamus. *Cotton & Levy*, for relator. *W. H. Cooley*, Judge, respondent.

LUDELING, C. J. In this case the relator prays for a mandamus to compel the judge of the Sixth District Court to grant him a suspensive appeal. The judge, in his answer, avers that the judgment rendered against M. Scoller was upon a rule taken by E. Newman & Co., plaintiffs in their suit *v. L. D. Cohn* on Scoller to traverse the answers of Scoller to interrogatories therein propounded on the ground that Scoller had confessed before three witnesses, that he had

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ample property to satisfy the writ and that his answers were false. Respondent further says, that as the suit was by attachment against a non-resident, it became essential for plaintiffs to contradict said answers in order to show the court had jurisdiction over the defendant, and therefore it was impossible legally to try the case as against defendant before it could be shown some property had been attached to vest jurisdiction; that after a regular trial the rule was made absolute, taking the interrogatories for confessed, and it was ordered that such property and effects, as well as such sum as may be due by the garnishee, be subject to satisfy such judgment as may be rendered against the defendant; and respondent avers that this is a conditional interlocutory order and not a final judgment, and therefore not appealable until there be a judgment against the defendant on the debt claimed by the plaintiff.

We consider the answer states sufficient reason to justify respondent's conduct. C. P. 842.

It is therefore ordered that the application be dismissed at the relator's costs.

No. 3207.—ANSITE ROUBIEU v. JOHN D. CHAMPLIN.

The written acceptance by a person appointed by the court as curator *ad hoc* in a suit brought against an absentee, in the absence of a citation served upon him or any appearance by him in the proceedings, will not serve to interrupt the current of prescription.

A PPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. Pierson & Seay*, for plaintiff and appellee. *J. G. White*, curator *ad hoc*.

WYLY, J. On the eleventh June, 1860, the defendant made his three promissory notes, maturing one, two and three years after date, in favor of plaintiff, for \$2000 each, bearing eight per cent. per annum interest from date. In order to secure the payment of the same he also executed a mortgage on his plantation in the parish of Natchitoches.

In 1865 the plaintiff, alleging that the defendant was an absentee, caused a curator *ad hoc* to be appointed, contradictorily with whom she closed the mortgage and caused the property to be sold. The proceeds of said sale, to wit: the sum of \$6000, were accordingly credited on said demand by the sheriff on the sixth April, 1867.

Plaintiff then instituted an attachment suit against the defendant, in the parish of Rapides, making certain creditors of the defendant parties garnishees, and also causing the citation and attachment for the defendant to be posted at the courthouse door and notice thereof given to the curator *ad hoc* appointed by the court.

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The curator *ad hoc* pleaded, in his answer, the general issue and the following exceptions, viz:

First—That the suit can not be maintained, because it is based on a claim for interest alone, which is alleged to be due on three certain promissory notes held and owned by the plaintiff, when she judicially admits that she obtained a judgment on them on the twenty-first December, 1866, in the parish of Natchitoches.

Second—He pleads the prescription of five years.

The court rendered judgment in favor of plaintiff and the defendant appealed.

We will first consider the question of prescription.

The plaintiff contends that the proceeding to foreclose the mortgage in 1866 and 1867 interrupted prescription, and that this suit was instituted within five years thereafter. The defendant was not cited in that proceeding, being an absentee; the judgment rendered contradictorily with a curator *ad hoc* was not a personal judgment, but a proceeding *in rem*. It did not interrupt prescription because there was neither citation nor notice of the order served on the defendant. C. C. 3482, 3484, 3516, 3517; 2 An. 927; 6 R. 142.

A citation for the defendant in this suit was posted at the courthouse door on the first August, 1868, and on the same day a notice of his appointment was served on the curator *ad hoc*.

There was no suit as to the defendant till the sheriff affixed to the door of the courthouse the attachment and citation. C. P. 254.

The last of the three notes upon which this demand is based matured on the eleventh June, 1863. All the notes were more than five years past due when the citation was served and the prescription of five years had accrued. C. C. 3505.

Entertaining these views it becomes unnecessary to consider the other ground of defense.

It is therefore ordered that the judgment of the court *a qua* be annulled and avoided, and it is ordered that there be judgment for the defendant, with costs in both courts.

ON REHEARING.

WYLY, J. On further examination we find it will be unnecessary in this case to decide whether or not citation served on a curator *ad hoc*, in a proceeding *in rem*, is a legal interruption of prescription as to the absent debtor.

The record of the proceeding *in rem* at Natchitoches in 1865, introduced to prove an interruption of prescription, does not show that citation was served on the curator *ad hoc* appointed by the court to

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represent the defendant, then absent. It merely shows that R. M. Kearney was appointed curator *ad hoc* and that he wrote under the order these words :

“ I accept the appointment of curator *ad hoc* to represent the absent defendant, J. D. Champlin.

(Signed)

R. M. KEARNEY.”

The mere acceptance of the appointment of curator *ad hoc*, in the absence of a citation served on him or any appearance by him in the proceeding, certainly was not a legal interruption of prescription. 2 An. 927; C. C. 3482, 3484, 3517, 3516; 6 R. 142; 4 An. 509; 12 La. 533; 17 La. 215.

The prescription pleaded is an effectual bar to the recovery of plaintiff's demand on the notes.

It is therefore ordered that the judgment of the court *a qua* in favor of the plaintiff be avoided and annulled, and that there be judgment for the defendant, with costs of both courts.

No. 3224.—JANE MC C. HARRISON, Administratrix *v.* L. B. DAYRIES, Sheriff and others.

A owed two promissory notes, secured by mortgage on real estate. After the first note was prescribed on its face, the administratrix of the estate of A paid it. B, the holder of both notes, gave up the one which was paid, and resorted to executory process to enforce payment of the other note which was not prescribed. A enjoined the sale on the ground that, having paid a certain amount to the holder of the two notes after the first one was prescribed on its face, it became the duty of the holder to impute the payment thus made to the other note, not prescribed, and to enforce payment of which the executory proceedings are now taken. Held—That, in a case like this, the burden of showing that the payment was made through error and was intended to be applied to the payment of the note that was not prescribed, devolved on the debtor, and not on the holder of the note.

A PPEAL from the Seventh District Court, parish of Pointe Coupée. *Miller, J. Thomas H. Hewes and Samuel J. J. Powell*, for plaintiff and appellee. *W. D. Winter*, for defendant and appellant.

LUDELING, C. J. The plaintiff enjoins the sale of a plantation, belonging to the succession of Caleb B. Chinn, advertised for sale under an order of seizure and sale.

The grounds upon which the injunction is based, are, first, that the district judge had not jurisdiction to grant the order; second, that there was no authentic evidence of the transfer of the notes to the present holder; and third, that the debt was extinguished by compensation. The first and second alleged grounds are totally unfounded in fact, and they are not insisted on in this court.

The third ground is attempted to be supported by alleging that the tutrix (who is now the administratrix and plaintiff) paid \$7,137 77 to the defendant who gave up one of the notes, then held by her against

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the estate administered by the plaintiff, and that said note was prescribed at the time of payment, and that, consequently, the sum thus paid should have been (and was by law) imputed to the note due in January, 1861, which forms the basis of the executory proceedings against the property, the sale whereof was enjoined.

The note paid and taken up, *on its face*, was prescribed in November, 1865, when the first payment was made on it. But we are not prepared to say that it was, therefore, in fact prescribed; *non constat*, that the course of prescription had not been interrupted. The fact of payment by the tutrix creates, at least, a presumption that it had, for "*omnia præsumentur rite esse acta.*" This is not a suit brought upon the note against which prescription is pleaded, but the plaintiff, alleging that she has paid money in error, claims the right to require the party who received the money unduly, to apply it to the extinguishment of another note not prescribed. In such a case, it seems, the party alleging this should prove it, and she has failed to establish this fact, even with the evidence received by the district judge. But the testimony which establishes that the only indebtedness of the deceased, C. B. Chinn, to the defendant, Maher, was evidenced by the notes held by her, one of which was due in 1860 and was paid, and one other due in 1861, which forms the basis of this contest, should have been received. This, if a fact, is susceptible of being proved by parol or any other kind of legal evidence. If this fact, when proved, will enable the court to understand to what debt a written acknowledgment made by the deceased referred, that can not be a reason for excluding the testimony. There is nothing in the act of 1858 which militates against this view. The law provides "that hereafter parol evidence shall not be received *to prove an acknowledgment or promise of a party, deceased*, to pay any debt or liability against his succession, in order to take such debt or liability out of prescription or to receive the same after prescription has run or been completed; but that in all such cases *the acknowledgment or promise to pay shall be proven by written evidence, signed by the party deceased,*" etc. Nor is there anything in the case of succession of Heldebrant contrary to the views above expressed. See 21 An., p. 551.

The acknowledgment, relied upon in the case now under consideration, is in writing, and it is signed by the deceased.

In two letters to the defendant's son, he acknowledges his indebtedness to her, and promises to pay as soon as possible. In another he says: "Please find a check for \$200 in favor of your mother, which please credit on my note." This was dated twenty-fifth November, 1861. In his letter of the fourteenth May, 1861, he proposes to give an order on Estlin & Co. to pay over to her the proceeds of his crop, to the amount *at least of one of his notes*. These are the promises and

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acknowledgments which the act of 1858 requires to be in *writing and signed*. There is nothing in the laws to prevent parol proof to show that no other debt than the one claimed was due by him when he made the acknowledgments and promises to pay.

It is, therefore, ordered that the judgment of the district court be avoided and annulled, and that there be judgment in favor of defendants, dissolving the injunction, with twenty per centum on the amount of the judgment enjoined, as damages and costs of both courts.

No. 3139.—GARTHWAITE, LEWIS & STEWART v. F. SEIP AND A. E. CASSON.

A notary public who has made a protest of a promissory note and given due notice thereof to the indorser, can not be permitted, in a suit to enforce payment against the indorser, to contradict or vary what he has certified to in the act of protest.

APPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. R. A. Hunter*, for plaintiffs and appellants. *T. C. Manning*, for defendants and appellees.

LUDELING, C. J. The plaintiffs sue on a note of F. Seip, made to the order of A. E. Casson and indorsed by her. The defense of the indorser is that she is discharged from liability by the failure of the plaintiffs to demand payment of the maker at the maturity of the note.

The note was payable on the second of May and was due and demandable on the fifth of May, 1870.

The protest recites that "on the fifth of May, 1870, at the request of Messrs. Garthwaite, Lewis & Stewart, the holders of the original note, whereof a copy is on the reverse hereof written, I, William W. Whetington, Jr., a notary public in and for the parish of Rapides and State of Louisiana, duly commissioned and sworn, presented the said note to Mrs. Eliza Seip, the mother of the maker, Frederick Seip, at the domicile of the said Frederick Seip," etc. The notary was introduced as a witness to contradict this statement in the protest. "A public officer who has given a solemn certificate in his official character and under his seal, can not be listened to as a witness to prove it false. There is a degree of turpitude in certifying as true what the officer does not know to be true, as well as in certifying what he knows to be false. In either case, whatever may be the palliating circumstances, *in foro conscientiae* we think the falsity of the certificate ought not to be shown by the testimony of the officer himself." 14 La., p. 382; 5 Rob., 200; 7 Rob., 854.

In this case, however, even if we give effect to the testimony of the notary, it is so vague and uncertain as not to rebut the legal presumption in favor of the correctness of the statements in the protest. 2 R. 82.

Garthwaite, Lewis & Stewart v. Seip and Casson.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment in favor of the plaintiffs against Adelia E. Casson for the sum of fourteen hundred and forty one dollars and sixty eight cents, with interest at the rate of eight per centum per annum thereon from the second day of May 1866, cost of protest and costs of both courts

No. 2194.—ROBERT F. TIETGENS, Tutor, etc. v. SUCCESSION OF
KAMPER, etc.

23	219
Case 1	
113	410

No appeal lies from a judgment until it is signed by the judge.

A PPEAL from the Second District Court, parish of Jefferson. *Par-dee, J. A. Cazabat and N. Commandeur*, for plaintiff and appellee. *Henry Dugué*, for defendant and appellant.

Howe, J. This appeal purports to have been taken from a judgment rendered December 23, 1868, and signed December 30, 1868. There were reasons for judgment filed December 8 and December 23, 1868, but not signed. There is no regular judgment in the record—certainly none that is signed.

Appeal dismissed.

Rehearing refused.

No. 2215.—REEVE, CASE & CO. v. THE PHOENIX INSURANCE COMPANY.

28b	219
52	788

The insured is bound by all the conditions and restrictions clearly written or printed in the body of the policy. Therefore, if he has kept certain combustibles and inflammable oils stored in the building insured, which were specially excepted from risk by the insurers, and fire occurs, he can not recover the amount, or any portion of the insurance from the company. In such a case, the insured will not be permitted to urge that the exceptions were not specially pointed out to him at the time the insurance was effected, nor will the fact that such exceptions are unusual among the insurance companies in the city of New Orleans, avail him. Having accepted and taken possession of the policy, he is presumed to be familiar with all its clauses and provisions.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for plaintiffs and appellants. *M. M. Cohen*, for defendant and appellee.

This case was tried by a jury in the court below.

Howe, J. The plaintiffs sued on a policy of insurance against fire. The defendant answered by a general denial and by the further allegations that in the body of the policy it was provided that "petroleum, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises,

temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, otherwise this policy shall be null and void," and that some one or more of the above named articles were, during the existence and running of said policy, "stored, used, kept, or allowed on the premises insured, temporarily or permanently, for sale or otherwise, without written permission indorsed on the policy," and that, by reason of this violation of said provision of the policy, the same became null and void.

Defendant further alleged that by the said policy it was provided that "camphene, spirit gas, burning fluid, phosgene, or any other inflammable liquid, when used in stores, warehouses, shops or manufactories, as a light, subjects the goods therein to an additional charge, and permission for such use must be indorsed in writing on the policy, otherwise the insurance shall be void;" and that one or more of said articles were used in the premises insured as a light without the payment of an additional charge, and permission for such use was not indorsed in writing on the policy, and that, therefore, the insurance is void.

The case was tried before a jury who rendered a verdict for defendant, and from the judgment thereon the plaintiffs have appealed.

The evidence adduced on the trial satisfied the jury, and made it reasonably certain, that coal oil was "stored, kept, used and allowed" on the premises after insurance and before the fire took place in large quantities, and made it highly probable that the fire was caused by the explosion of a coal oil lamp, and considerably aggravated by the presence of the forbidden combustibles. Indeed, it is not seriously contended by the plaintiffs that these provisions were not violated. But they contend that the insured were not bound by the clauses in question: First, because "they were not usual in this market;" second, because "the agent of the defendant concealed the unusual clauses from them;" third, because "the attention of the insured was not specially directed to them," when, "if they had known of such clauses, they would not have effected the insurance in the defendant's company."

First—We do not think the unusual character of these clauses in New Orleans, if established, could affect the right of defendant under the circumstances of this case. The policy was accepted by the insured nearly a month before the fire; the assent of the insured to all its provisions is presumed; and to allow the express contract of the company to be varied or impaired by the contracts of other companies in the same city, would be very dangerous.

Second—There is no evidence to establish the serious charge that the agent of the defendant concealed these clauses from the insured. He signed and delivered to them the policy in the usual way. The clauses

Reeve, Case & Co. v. The Phoenix Insurance Company.

in question are printed plainly in the same type as the rest of the body of the instrument, with the first words of each in capitals, and attention called to the paragraphs, respectively, by an index (B). If the insured did not examine the policy, it would seem to have been their own fault. 2 Cranch, 444.

Third—We do not think the rights of the defendant can be impaired by the fact that the attention of the insured was not specially directed to these clauses. As before remarked, the policy was executed and delivered to the insured in the usual way. It is not a long document. It could be read in a few moments. It remained in possession of the insured for twenty-six days before the fire. We think the insured must be held to be fully bound by its terms.

Judgment affirmed.

No. 2192.—DRUMMOND, DOIG & CO. v. STEAMER CASTRO and Owners.

To enable a defendant to recover damages for the non-completion of a job of repairing a steam boiler within the time specified in the contract, it must be shown by defendant that the fault was with the plaintiff. If the evidence shows that the delay was unavoidable, and that the plaintiff made the defendant acquainted with the causes of the delay, no damages can be recovered on account thereof.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict* and *E. Pearson*, for plaintiffs and appellants. *George L. Bright*, for defendant and appellee.

HOWELL, J. Plaintiffs sue for \$950 for materials furnished and repairs made to the steamer *Castro*.

The answer presents the general issue and a plea in reconvention for damages caused by the non-completion of the work within the stipulated time. The correctness of plaintiffs' claim is not disputed. The contest relates to the alleged damages for which the judge *a quo* gave judgment. The work was done under a contract in the shape of the following proposal:

"SIR—We respectfully propose to repair the boiler of the *C. Castro*, to wit: To cut old head, tube sheet and flues; furnish one new head and tube sheet and sixty new three and one-half inch tubes; place the same properly in boiler. The above materials to be first quality and workmanship on same to be first class for the sum of nine hundred and fifty (\$950) dollars.

Should you see proper to favor us with the work, we would require sufficient time to receive the iron from New York, as there is none in the city, which would be about twenty (20) days, and therefore would not be able to complete the work in less than four weeks from the time of commencement.

Very respectfully,

(Signed)

DRUMMOND DOIG & CO.,
Per KANE."

Drummond, Doig & Co. v. Steamer Castro and Owners.

So soon as this proposition was accepted, plaintiffs ordered the necessary materials from their correspondent in New York, and when the vessel was delivered to them they commenced the work, before, however, receiving the ordered materials, and did not complete the work until the expiration of six weeks from that time. It is shown that they used every means to procure the iron from New York, and that, had it been received in the ordinary time for filling such orders, they could have finished the work in the time referred to in their proposal; but the iron was not in New York, and their agents or correspondents had to send to the mills in Pennsylvania to obtain it. This delay was reported to the defendant, and a letter from New York, explaining its cause, was shown to him. Plaintiffs were evidently not in fault. Their importunity with the New York merchants caused the latter to decline any further orders from them. And, besides, the written proposal of plaintiffs does not fix a positive term. They say: "We would require *sufficient time*, which would be *about* twenty days, and therefore would not be able to complete the work *in less than* four weeks from time of commencement." They do not say they would complete it within four weeks. Their object was to inform defendant that a delay was requisite to procure the necessary iron and that the completion of the job would depend on its reception.

Under the circumstances, plaintiffs were not liable for any alleged damages which defendant claims.

It is therefore ordered that the judgment against plaintiffs on defendants' reconventional demand herein be reversed and annulled, and that there be judgment thereon in favor of plaintiffs, with costs of both courts.

Rehearing refused.

No. 3205.—GEORGE C. BENHAM et als. v. W. W. COLLINS, Sheriff, et als.

A bond taken by the sheriff, under an order of the court, for the release of property under seizure, must contain all the formalities required for the execution of judicial bonds. If defective in this respect, it is not binding on the sureties. Therefore, if a bond of release of property under seizure be not signed by the principal but be only signed by the sureties, it is not binding on the principal nor the sureties.

APPEAL from the Thirteenth Judicial District, parish of Carroll. *Hough, J. J. Edwards Leonard*, for plaintiffs and appellants. *Sparrow & Montgomery*, for defendant; *M. Dubose* and *W. B. Spencer*, for Collins, Sheriff, appellees.

TALIAFERRO, J. Lucy Owen, having leased her plantation to Boss and Andrews for the years 1867 and 1868 for a large sum, specified in a written instrument, and the lessees failing to fulfill their obligations, the lessor brought suit against them and seized provisionally the crop of cotton of 1867 or that part of it which was in the fields and un-

93	223
108	211
23	223
110	478

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picked at the time of the seizure and likewise all the stock, work animals, farming utensils, etc. The seizure was released under a bond, conditioned that the property should be returned and made subject to such judgment as might be obtained by the lessor, or that the obligors on the bond should pay \$11,000. Benham and McMillen are sureties on this bond with Andrews as principal. Boss and Andrews, it appears, went into bankruptcy, and no active measures have since been taken to prosecute the suit. Under this state of things the two sureties bring this action against the sheriff and Lucy Owen to annul the bond and release them. The grounds taken are:

First—That the bond of release was not signed by the principals, Boss and Andrews.

Second—Because there was no law in force at the time the bond was executed, authorizing property provisionally seized for the payment of rent, to be released under bond.

The defendant in this suit, Lucy Owen, in her answer denies generally the allegations of the petition; alleges that her lessees and the plaintiffs are liable on the bond, and prays judgment against them *in solido* for the amount of the bond. The sheriff answered that on his personal responsibility he agreed to have the property seized under the lessor's writ in the hands of Andrews, and took the bond declared upon, with the plaintiffs as sureties; that Andrews converted the property released to his own use, and that through the failure of Andrews and his sureties to return the property to him, a fraud has been perpetrated upon him; that Andrews received a good and valid consideration in the use and enjoyment of the property; admits his own responsibility to Lucy Owen, but prays judgment *in solido* against the plaintiffs for the amount of the bond.

The judge *a quo* considered the bond defective as a judicial bond and gave judgment against the defendant, Lucy Owen, on her direct demand; but rendered judgment in favor of the sheriff (for the use of Lucy Owen, administratrix) against the plaintiffs, as sureties of Boss and Andrews, for \$7000, on their failure to restore the property released by the bond. From this judgment the plaintiffs have appealed. The bond was signed by Andrews alone and the two sureties. The order of court, allowing the parties to give bond, authorizes Boss and Andrews to execute bond with solvent security, etc.

We think the bond clearly defective and not obligatory upon any of the parties to it. See case of King and Gerson v. Baker, 7 An. 571; 16 L. R. 174.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; that the plaintiffs be released from liability on the bond, the defendants paying costs in both courts.

No. 3169.—JEFFERSON WELLS, Curator v. J. M. WELLS, Executor.

The exception to the capacity of the plaintiff to stand in judgment must be pleaded *in limine litis*. If only made at the time the answer is filed and the defendant goes to trial without requiring a decision thereon, it will be presumed to have been waived, and will not be considered thereafter.

A party defendant, having admitted in the record in the court below that the plaintiff had established a portion of his demand, can not be allowed to question its correctness on appeal.

APPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. E. North Cullom, William A. Seay and H. S. Losce*, for plaintiff and appellee. *J. G. White and T. O. Manning*, for defendant and appellant.

Howe, J. The plaintiff, as curator of Mrs. Martha L. Wells, an interdicted person, instituted this action against J. M. Wells, executor of T. J. Wells, deceased, to recover one undivided half of a tract of land, one-half of one hundred head of cattle and the sum of \$17,850 with interest from judicial demand.

The decedent, T. J. Wells, represented by the defendant, was the husband of the insane lady who is represented by the plaintiff. The land, cattle and money are claimed as paraphernal property of the wife, inherited from her father and taken into possession of her husband many years since.

The answer of the defendant was, first, a general denial. He then denied the capacity of the plaintiff, and then set up special defenses which will be noticed hereafter.

The exception to the representative capacity of the plaintiff not having been pleaded *in limine litis*, and the defendant having gone to trial on the merits without having required a decision thereon, the point will not be considered at this stage of the case. 19 L. 429; 3 An. 150; 6 An. 533; 11 An. 688.

First—On the merits we find the admission of both parties that the plaintiff, as curator, had established his claims to an undivided half of one thousand arpents of land, and thus far the judgment can not be complained of. The improvements appear either to have been on the land when inherited by the interdict, or to have been built out of the proceeds of the plantation while managed as her separate property, and under her own administration.

Second—The claim for the cattle seems to be made out.

Third—The claim for money received by T. J. Wells is clearly proved by the recitals in the act from T. J. Wells to Martha L. Wells, of February 20, 1843, and the oral testimony of witnesses in the case. It does not clearly appear that any portion of these sums represents the supposed value of slaves, as alleged in the answer.

Judgment affirmed.

State ex rel. S. Belden, Attorney General v. Burgess et als.

No. 3102.—THE STATE OF LOUISIANA, ex rel. S. BELDEN, Attorney General v. H. T. BURGESS et als.

The act of the General Assembly of 1865, No. 52, granting to certain individuals named therein the right to cut a canal through the territory of the State of Louisiana and to use the lands contiguous thereto for the term during which the canal is to be enjoyed by the grantees, after which the lands are to revert to the State, is not a giving of State aid within the meaning of article 112 of the Constitution of 1864. Nor is the right given the grantees by the act No. 52 of 1865 to acquire the lands drained by the canal, a giving of State aid. This latter clause, conferring on the grantees the right to acquire the lands drained by the canal, only confers a pre-emption or preference on the grantees over other persons to acquire certain lands. This act does not, therefore, violate article 112 of the Constitution of 1864, which was in force at the time it was passed.

The act of 1865, No. 52, while it confers certain rights and privileges on the individuals named, does not constitute them a judicial person. It is not, therefore, in violation of article 121 of the Constitution of 1864, which prohibits the Legislature from creating a corporation.

This act does not violate article 127 of the Constitution of 1864, which declares that the swamp lands granted by Congress to the State to aid in levying and draining them, etc., shall not be diverted from the purposes for which they were granted, because it contains nothing which would indicate a purpose to violate this provision. It simply gives the grantees the right of pre-emption and fixes the price, and gives to them, on condition that they shall cut the canal within a given time, a term of credit. It directs that the proceeds arising from the sale, when due, shall be paid into the treasury, where the presumption is that they will be applied for the purposes for which the donation by Congress was made.

The proclamation of the President of the United States, dated twentieth of August, 1866, declaring that peace existed throughout the United States, is the period at which the late war between the United States and the so called Confederate States terminated. Therefore the work of cutting a canal through the territory of Louisiana, as authorized by the act No. 52, of 1865, which was required by said act to be commenced within four months from the termination of the war which was then going on, was commenced within the time required, if commenced within four months from and after the date of twentieth of August, 1866.

The State, through the action of her Legislature having thrown obstacles in the way of the completion of the canal which she had authorized certain individuals to construct, can not be permitted to claim a forfeiture of the grant on account of the non-completion within the time.

The Legislature can pass no law which impairs the obligations of a contract. The power and right of interpreting laws belong to the judiciary *alone*. Therefore, an act of the General Assembly which assumes to judge when an obligation has been violated or when a right or franchise has been forfeited, is absolutely null, because the Legislature has no power to pass such an act or to sit in judgment in such a case.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Simeon Belden*, Attorney General, relator, appellant. *Cotton & Lery*, for defendants and appellants.

LUDELING, C. J. This suit was instituted to prevent the defendants from acting under a grant made to them by an act of the Legislature of this State in 1865, numbered 52, on the grounds that the act was unconstitutional; that it had been repealed by a subsequent act of the Legislature, and that defendants had failed to commence the work within four months after the termination of the war or to complete the work within three years thereafter.

First—It is contended the law in question is in contravention of articles 112, 121 and 127 of the Constitution of 1864, in force when the act was passed. Article 112 provides that State aid shall not be given to companies, etc. The act No. 52 does not *give aid* in the sense of the

article of the Constitution. It grants a privilege to certain individuals to cut a canal through the territory of the State of Louisiana and to use the lands contiguous to the canal for its benefit for the term during which, by the act, the canal is to be enjoyed by the grantees. But these lands and the canal are to revert to the State after the lapse of fifty years.

Nor is the right, given the grantees to acquire the lands drained by the canal, a giving of aid by the State. It is simply a right of *pre-emption*—a right to purchase by preference lands which are supposed to be of little value in their present condition, but which may, and probably will, be rendered valuable, should the canal ever be cut.

The act does not create a *corporation*. It confers certain *rights and privileges* on the individuals named, but it does not constitute them a *juridical person*; therefore it does not violate article 121. Neither does the act violate article 127, which declares that the swamp lands granted by Congress to the State to aid in levying and draining, in order to reclaim the swamp and overflowed lands, shall not be diverted from the purposes for which they were granted. There is nothing in the act to indicate a purpose to violate this provision of the Constitution. It gives the grantees a right of pre-emption; fixes the price at twenty-five cents per acre, and gives a term of credit to them on condition that they shall cut the canal. When the *proceeds* of these lands shall have been paid into the treasury, we are bound to presume they will be appropriately applied to the purposes intended by Congress. Besides, it is not unreasonable to suppose, and witnesses in this case have stated, that the cutting of the canal will drain much of the swamp and overflowed lands through which it is to pass and thus partially carry into effect the enlightened and liberal policy of the General Government in making these grants of swamp lands to the State.

Second—Have the grantees complied with the conditions of their grant by commencing the work within four months and completing it within three years after the termination of the war?

It is proved that the work was commenced on or about the twenty-seventh day of April, 1866.

The President of the United States issued his peace proclamation on the twentieth of August, 1866, and the Supreme Court of the United States has decided that the proclamation fixed the period when the war terminated. 9 Wallace, 56.

The work, therefore, was commenced in time.

The Legislature of the State passed a joint resolution on the thirteenth March, 1866, directing proceedings to be instituted by the Attorney General for the forfeiture of the grant, and in March, 1867, the Legislature passed an act to repeal the law enacted in 1865, making the grant.

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The evidence in the record shows that the passage of the joint resolution and the act of repeal affected the credit of the defendants so seriously that they were unable to carry on the work; and that the failure to complete the canal within the time fixed was owing to the unjustifiable acts of the Legislature. The State should not be permitted to claim a forfeiture of the grant for the non-completion of the canal, when the acts of the Legislature interposed obstacles which retarded, if they did not actually prevent, the completion. It is a perfectly well settled principle of jurisprudence that no one can take advantage of his own wrong. Pothier on Obligations, No. 212; C. C. article 204 (2035 French text); 19 La. 501; 4 R. 45.

Third—It is now well settled that a Legislature can not impair the obligation of a contract entered into by a former Legislature. 6 Cranch, 87; *Flotcher v. Peck*, *Woodward v. Dartmouth College*, 4 Wheaton, 518; 12 La. 352; *State v. Bermudez*, 6 R. 115; 11 R. 414; Constitution of United States, article 1, section 10.

The act of 1865, granting certain rights or privileges to defendants, was a contract the obligation of which could not be impaired by subsequent acts of the General Assembly. And it is equally clear that the duty of *interpreting laws* belongs to the *judiciary*, and it alone has the power to decide when an obligation has been violated, or when a right or franchise has been forfeited. The act of the Legislature passed thirteenth March, 1867, and numbered 62, is, therefore, unconstitutional, null and void.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

HOWE, J., *dissenting*. I am constrained to think that the act in question is in conflict with that article of, the Constitution of 1864 which provided that the aid of the State should not be given to companies or associations of individuals in a certain way and under certain limitations. Article 112. I must, therefore, dissent in this case.

No. 3170.—A. VOINCHE v. F. VILLEMARETTE.

The collection of a note, the consideration of which is shown to be Confederate treasury notes and money lost in playing cards, can not be judicially enforced. And if judgment has been given in the court below for a portion of the note, and the evidence shows that the entire note is tainted with illegality, the Supreme Court will, in the interest of public policy, reject the whole demand.

APPEAL from the Seventh District Court, parish of Avoyelles.
Miller, J. Irion, Overton & Cullom, for plaintiff and appellant.
S. B. Thorpe, for defendant and appellee.

LUDELING, C. J. This is an action on a note for \$1300, with interest. The defense is that the consideration of the note was illegal.

Voinche v. Villemarette.

There was judgment in favor of the plaintiff for \$10 65, and the plaintiff has appealed.

The evidence proves that the note sued on was given to replace three others which had been given for Confederate money and money lost at cards.

The note is tainted with illegality, and courts of justice will not lend their aid to enforce its collection. 1 Parsons on Contrasts, 456; 6 Rob., 115; 21 An. 325; 22 An. 462; art. 127 Constitution.

It is our duty under the law and in the interest of public policy to reject the whole demand. It is therefore ordered that the judgment of the lower court be avoided and reversed, and that the plaintiff's demand be rejected, with costs of both courts.

No. 3149.—SUCCESSION OF P. P. PRUDHOMME—Opposition of CITIZENS' BANK, et als.

An administrator who has admitted the correctness of debts against the succession he represents, will not afterward, on the trial of opposition to the tableaux he has filed, be permitted to allege or show, either in his individual capacity or as the representative of the succession, that the debts which he has admitted, are incorrect. Therefore his answer to oppositions filed by the creditors, in which he asks an amendment of the tableaux on the ground that claims which he has admitted to be correct, are incorrect, should not be permitted to be filed in the record.

All successions must be opened and settled in the parish courts. Therefore, if an account and tableaux, made out and filed by the administrator in the parish court, be opposed by the creditors, such oppositions can only be disposed of by the parish court, irrespective of the amount involved.

APPEAL from Parish Court, parish of Nathitoches. *H. C. Myers*, Parish Judge. *Pierson & Levy*, for appellees. *Chaplin, Morse & Chaplin*, for opponents and appellants.

LUDELING, C. J. An account of the administration of the succession of Pierre Phanor Prudhomme having been advertised, several oppositions thereto were filed by creditors whose claims had been acknowledged by the administrator. These opponents represent that J. A. Prudhomme, Harriet Prudhomme and P. E. Prudhomme are severally placed on the tableau as privileged creditors for large sums, whereas, in fact, they are not creditors, but debtors of the succession; and they further oppose the plea of prescription against the claims of said J. A., Harriet, and P. E. Prudhomme, and pray that their claims be stricken from the tableau, and that the tableau be amended, etc. These oppositions were answered by the parties whose claims were opposed, and also by the administrator, who denied the correctness of opponents' claims, notwithstanding his previous acknowledgments.

The administrator, in his individual capacity as a creditor and in his fiduciary character, then filed a plea to the jurisdiction of the parish court on the ground that the matter in dispute exceeded five hundred dollars.

Succession of Prudhomme.

Having acknowledged the claims of opponents and placed them on his tableau as just debts against the succession, the administrator will not be heard in a court of justice to allege his own malfeasance or to contradict his judicial admissions, when his interests suggest such conduct. His answer to the opposition for amendment of the tableau, with the view to deprive the parish court of jurisdiction, was improperly permitted to be filed. The contest is between the creditors who alone are interested in the funds to be distributed. As between themselves the controversy, relating to the validity of their respective claims or the rank of their debts, does not concern the succession or its representative, the administrator, who is a mere stakeholder, and the succession is not a party to the contest in the sense of article eighty-seven of the Constitution. The Constitution requires all successions to be "opened and settled in the parish courts." To settle a succession, the debts must be known, and the authorization of the court must be obtained to pay them by the administrator. If the funds be insufficient to pay all the debts, the privileged debts must be paid, and a *pro rata* distribution among the ordinary debts be made with the sanction of the court. For that purpose a tableau of distribution is filed. Any contest among the creditors on the tableau, relative to their claims, must necessarily be decided by the parish court incidently to a settlement of the succession. 22 An., Paul O. Hebert, tutor, *v.* Winn et al.; 22 An., p. 517, Hart, tutrix *v.* Hoss & Elder; 22 An. 101, succession of Bingay; 21 An. 480, Swan *v.* Gayle.

It is therefore ordered and adjudged that the judgment of the parish court be avoided and reversed. And it is further ordered that the case be remanded to the parish court, to be proceeded with according to law, and that the appellees pay the costs of this appeal

No. 3239.—PENELOPE ANDREWS and Husband *v.* HENRY WARE.

Movables, acquired subsequent to the dissolution of the marriage by the surviving spouse, do not constitute a part of the community. Therefore, if the survivor has sold a plantation and conveyed with it all the movables and fixtures belonging to the community, the vendor or his assignee may recover from the vendee all the movables expressly reserved in the act of sale, as not constituting a part or portion of the community, on showing that they have been acquired since its dissolution.

A PPEAL from the Fifth District Court, parish of Iberville. *Posey, J. W. B. Robertson*, for plaintiffs and appellees. *Barrow & Pope*, for defendant and appellant.

WYLY, J. The plaintiff, the transferee of John Andrews, sues the defendant for certain movable property mentioned in the petition, on the plantation sold to him by said John Andrews and which, she contends, was not included in the act of sale.

We find in the act of sale from John Andrews to the defendant the

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following clauses, to wit: "The said plantation above described being sold, together with all the buildings, improvements and appurtenances thereon being and thereunto belonging, consisting chiefly in a dwelling house, sugar house, sugar mill, steam engine, saw mill, etc., and all machinery and fixtures belonging to said engine and mills, the said purchaser, having well examined the same, requires no further or more particular description thereof; the said parties, vendors, intending by this sale to include all the property of whatever nature or kind soever belonging to the community of acquets and gains which existed between the said John Andrews and his deceased wife, and in which his said children and co-vendors are interested; the said John Andrews hereby reserving from said sale all live stock, plantation utensils, agricultural implements, household and kitchen furniture and utensils, carriages, buggies, and generally all movable articles of any nature or kind whatsoever now on said plantation, which movables thus reserved do not belong to said community, but are the separate and individual property of said John Andrews."

It appears that the wife of John Andrews died in 1848, and the movables claimed by the plaintiff were acquired by him since the death of his wife.

The articles claimed, and for which the court gave judgment in favor of the plaintiff, are all movables, and are expressly reserved in the act of sale, being the separate property of said John Andrews.

Whether the arbitration was valid or not, the evidence shows that the plaintiff is entitled to the property for which the court gave her judgment.

Let the judgment be affirmed with costs.

No. 3226.—GEORGE W. BUCKNER v. CHARLES RUSTON.

Under the election law of 1870 the whole parish is constituted an election precinct. Therefore votes for ward officers of the parish, such as justices of the peace and constables, may be cast at voting precincts outside of the ward for which the officer is to be elected. A contest for the office of justice of the peace of a particular ward of a parish, predicated on the fact that a majority of votes cast in that ward were in his favor, can not, therefore, be maintained, if his opponent has received a majority of all the votes cast for that office at all the voting precincts of the parish.

A PPEAL from the Fifth Judicial District, parish of East Baton Rouge. *Posey, J. Andrew S. Herron*, for plaintiff and appellee. *R. W. Knickerbocker*, for defendant and appellant.

This case was tried by a jury in the court below

LUDELING, C. J. The plaintiff contests the election of the defendant to the office of justice of the peace for Ward No. 2, in the parish of East Baton Rouge.

There was a verdict of a jury in favor of the plaintiff, and the defendant has appealed. The evidence shows that the plaintiff

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received a majority of the votes cast in the box or voting precinct held in the Second Ward, but that the defendant received a large majority of the votes cast for the office of justice of the peace for Ward No. 2 at the various polls in the parish. It appears from the evidence that an agreement was entered into between the mayor of the city and the supervisor of registration that the colored voters should vote at the courthouse and Murphy's school and the white voters should vote at the polls in Ward No. 2, and that said agreement was observed by the voters. It further appears that there were six polls opened in all the parish and that there are twelve wards in the parish.

The only objection urged to the election of defendant is that a majority of those who voted for him did not cast their votes at the poll in Ward No. 2. After the agreement already referred to, it would be unfair to claim the office on this ground; but the act of 1870 seems to have conferred the power on the supervisor of registration to declare where polls should be opened, without reference to the territorial limits of wards, and it declares the whole parish was one election precinct. Acts of 1870, No. 100, p. 145. It would seem, therefore, that votes for ward officers, such as justices of the peace and constables, may lawfully be cast at polls outside of the ward for which the officers are to be elected.

The consequences resulting from this law may be deplorable, but we are not at liberty to disregard the plain provisions of the law.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the district court be reversed; and that there be judgment in favor of the defendant, rejecting plaintiff's demand, with costs in both courts.

No. 3179.—SARAH H. LOYD'S EXECUTOR v. JAMES D. LOYD'S EXECUTOR.

In a suit for partition of a body of land belonging to a succession the court appointed experts who reported that the land could not be divided in kind without great injury. Both parties assented to the report and desired a sale in block. The court *a quo* refused to homologate the report and decreed a division in kind. The plaintiff appealed, and the defendant admitted, in the appellate court, that the property could not be divided in kind without serious injury to all parties.

Held—That the judge *a quo* should have decreed a sale in order that a partition of the proceeds might be made, but that in making the sale the provisions of article 135 of the Constitution must be observed, and that the lands must be sold in lots of not less than ten nor more than fifty acres each.

A PPEAL from the Ninth District Court, parish of Rapides. *Osborn, J. T. C. Manning*, for plaintiff and appellee. *H. S. Losee*, for defendant and appellant.

HOWE, J. This is an action for partition. The succession represented by plaintiff was opened in 1870. Experts reported that the plantation could not be divided in kind without great injury. The

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defendant assented to this view and both parties desired a sale in block with division of the proceeds. The court refused to homologate the report and decreed a division in kind. The plaintiff appealed and the defendant admits the correctness of the views expressed in the appellant's brief in regard to the injurious effects of a division in kind. The judgment should be reversed and the property ordered to be sold with reference to a division of the proceeds.

But, as intimated in the argument, the succession having been opened in 1870, the sale thus made must be conducted in accordance with article 132 of the present Constitution, which requires that for the purposes of this sale the land shall be divided into tracts of from ten to fifty acres. This provision is positive, and the act of 1870, No. —, provides a method of carrying it into effect.

It is therefore ordered that the judgment appealed from be avoided and reversed; that there be judgment in favor of the plaintiff, as prayed for, decreeing a partition of the plantation described in the petition; that the report of experts adverse to a division in kind be homologated; that the said land be sold at public sale in accordance with law to effect a partition; and that the appellee pay the costs of appeal.

No. 2573.—EMILE L. BREAUx v. THE PARISH OF IBERVILLE.

The police jury of a parish have no authority, growing out of their general powers, to enter upon schemes of finance by executing and putting upon the market bonds or notes of the parish they represent, for the purpose of raising money for any purpose whatever. Therefore the holders of bonds or notes of the parish which have been executed by the authority of the police jury, or notes signed by the president and treasurer of the police jury, who themselves had no authority from the Legislature to make such bonds or notes, can not enforce their payment against the parish. Such bonds or notes, having been given or authorized by the police jury without any authority of law, are null and void and of no binding force or effect against the parish.

A PPEAL from Fifth Judicial District, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *Zenon Lebauve*, for defendant and appellant.

TALIAFERRO, J. There is a motion to dismiss the appeal taken in this case on the grounds:

First—That it does not appear that the judgment appealed from has ever been entered upon the minutes of the court.

Second—That the defendant did not before appealing exhaust all his remedies by law in the lower court, not having moved for a new trial.

Third—There is no order granting an appeal.

The third ground stated is the only one we deem it necessary to examine. We find by the minutes of the court, under date of twenty-third of September, 1869, an order in the usual form, reciting that "on motion of counsel for defendant it is ordered that an appeal be

23	232
48	333
49	766
23	232
113	554

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granted," etc. It appears that the signature of the appellant's counsel is affixed below the order. This has no effect whatever upon the order, which must be taken as the act of the court. We think the objection has no force, and therefore overrule the motion to dismiss.

The parish of Iberville, through its police jury, is sued on a promissory note for \$1518 20, with eight per cent. interest from the ninth of January, 1867. The instrument sued upon is in these words:

"\$1518 20. Iberville, May 15, 1866. The parish of Iberville will pay fifteen hundred and eighteen dollars 20-100 to the bearer on the ninth day of January, 1869, at the office of the recorder of the parish of Iberville, with interest thereon at eight per cent. per annum from maturity until paid

(Signed)

A. DUPUY, Treasurer.

(Signed)

J. A. DARDENNE, President.

Indorsed—Presented and registered January 9, 1866.

(Signed)

A. DUPUY, Treasurer."

The defense is that the instrument sued on was issued without warrant or authority of law, and is null for that reason and for the further reason that it was issued in renewal of an original obligation which was executed for the payment of the price of slaves; that upon the issuing of the instrument the police jury made no provision for the payment of it as required by law; and, lastly, that the individuals, composing the police jury at the date of the obligation, were not legally members of that body, and their acts on that account are null.

Judgment in the court below was given in favor of the plaintiff, and the defendant has taken this appeal.

It appears from the record that in 1859 the police jury of the parish of Iberville, for the purpose of constructing a work of considerable magnitude and of great public importance to the people of the parish, that of a levee to protect a part of the interior portion of the parish from overflow and to serve also as a public road to facilitate intercommunication, appropriated \$25,000 by ordinance passed on the twelfth of April, 1859, to which was added by another ordinance, passed on the sixth of June following, the sum of \$10,000. This aggregate of \$35,000 was directed to be invested in slaves, to be purchased for the parish to perform the labor. Slaves were accordingly purchased in September of the same year by commissioners appointed for that purpose. It seems that \$30,450 in cash were expended in the purchase of a number of slaves, and that parish bonds had been issued and sold to raise the money. In January, 1866, on the application of the holders of these bonds, the police jury of the parish renewed them by a new issue of obligations, of which the promissory note on which suit is brought in this case, is one.

A bill of exceptions was taken by the defendant to the ruling of the

court, by which it ordered upon the plaintiff's motion, after the defendant's counsel had closed his evidence, two documents introduced by the latter, viz:

First—The ordinance of the police jury appropriating ten thousand dollars additional to the appropriation of January, 1859, and directing the purchase of slaves with bonds of the parish to be issued for that purpose.

Second—The act of sale of the slaves by Gilberth to the parish of Iberville. The objection to this evidence of the defendant is based on the claim of the plaintiff that he is the *bona fide* holder of the negotiable instrument sued upon for value before maturity and without notice of equities or defects in the instrument.

We think the court erred. These acts, it seems, were received without objection; they appertain to the whole transaction and should not have been excluded. 12 An. 12; 13 An. 445. The article 128 of the State Constitution and the construction given to it in a late decision of this court establish that notes executed for the price of slaves form an exception to the rule invoked by the plaintiff; the constitutional provision limiting in that respect the commercial law. See case of Groves v. Clark et al., 21 An. 567.

Police juries are corporations whose powers are limited and clearly defined by the Legislature. We think it well established that whenever the interests and wants of a parish require local legislation, which the police jury is not clearly empowered to establish, a delegation of the power to adopt such legislation must first be obtained. Such has been the usage especially in regard to the issuing and selling bonds. Frequent instances of this usage occur. The act of 1852, numbered 177, authorizes the police jury of the parish of Jefferson to issue and sell bonds to construct two shell roads. Act No. 185 of acts of 1854 authorizes the police jury of Pointe Coupée to issue bonds to pay debts. Acts of 1869, No. 35, authorizes the police jury of St. James to issue bonds to build a court house and jail and to pay debts. Acts of 1869, No. 49, authorizes the city of New Orleans to issue bonds. Other instances might be cited where powers have been delegated to those bodies to perform other acts which they are incompetent to do under their general powers. The powers of these corporations must be construed strictly. The issuing and putting into circulation of bonds or other instruments, creating obligations against a parish, are the exercise of an important, not to say a dangerous, power and one certainly not given to police juries by the general law organizing those bodies. For parochial purposes they are authorized to levy taxes, and they are prohibited (Revised Statutes, p. 411, sec. 23) from contracting debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying principal and interest.

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In the case we are considering, it is shown that the works contemplated were of great public utility, and that the people of Iberville desired them to be completed. These reasons, however strong, do not justify a disregard of law in the proceedings to accomplish the object desired. It is not important in this case to inquire into the legality of the several ordinances passed on this subject, so far as that legality is questioned on the ground that the means for discharging the indebtedness were not provided in the ordinance making the appropriation.

We are inclined to think that the common construction heretofore given to the powers of police juries in regard to their issuing bonds or obligations of the sort in question, and which ignores the existence of such a right, is the correct one. We can find no warrant for the exercise of such power under any of the enumerated powers granted to those bodies by statute. Having the power granted to levy a tax to defray the cost of any such public works as they are authorized to do, there is no need of resorting to other means under the pretense of exercising implied powers. Under the general powers granted, and they are express, specific and well defined, they seem clearly without right to adopt schemes of finance and make investments of parochial funds, as the police jury of Iberville has done in this case. For these reasons we think their proceedings null. Entertaining these views in regard to the issue of the bonds, it becomes unnecessary to examine the other grounds of defense.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that judgment be rendered in favor of the defendant, the plaintiff and appellee paying costs in both courts.

ON APPLICATION FOR REHEARING.

HOWE, J. An application for rehearing has been made in this case, supported by an elaborate brief. We apprehend that the point in dispute can be settled by a reference to the articles of the Civil Code in relation to political corporations and the construction given by this court to those articles.

This is not an action for work done or supplies furnished to the parish of Iberville, of the value of which the note in suit is merely sought to be used as evidence. It is an action on a promissory note made by J. A. Dardenne, President of Police Jury, and A. Dupuy, Treasurer, and it is claimed by plaintiff that the parish is bound by these signatures of its official agents. The defendant denies the authority of these its agents to make for it a promissory note.

Article 420 of the Civil Code, 1825, declares that political corporations are those which have principally for their object the administration of a portion of the State, and to whom a part of the powers of government is delegated to that effect.

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Article 429 recognizes the fact that a corporation can act only through agents, "under the name of mayor, president, syndics, directors or others, according to the statutes and qualities of such corporation."

Article 430 declares that these attorneys in fact or officers, "by contracting, bind the corporations to which they belong in such things as do not exceed the limits of the administration which is intrusted to them; their act is supposed to be the act of the corporation;" and "if the powers of such attorneys or officers have not been expressly determined, they are regulated in the same manner as those of other agents."

Article 2966 declares that the power of an agent to draw a promissory note must be express and special. Such express and special power could only be conferred on a police jury or its officers by statute, and no such statute exists in this case.

It seems clear then that the officers who signed the note in suit had no legal authority to bind the parish in that form. Such was the doctrine recognized by this court in *Louisiana State Bank v. Orleans Navigation Company*, 3 An. 294, in which the validity of an indorsement and guaranty of bonds or notes by the First Municipality of New Orleans was drawn in question. And this rule is not merely technical. It is in harmony with the spirit of the Roman law in regard to communities, the articles of our code above cited having been imported with little change from that system of jurisprudence. Domat., part 1, lib. 2, tit. 3. It is in harmony also with the jurisprudence of the United States, as settled by the highest authority. Mr. Kent says, vol. 2, p. 298: "The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation or as are necessary for the purpose of carrying into effect the powers especially granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the State courts. 2 Cranch 167; 4 Wheaton 636; 4 Peters 163; 13 Peters 587; 14 Peters 122; 12 Wheaton 68."

Rehearing refused.

No. 3143.—JOHN C. IRVING and AMANDA IRVING, Administrators, etc.
v. ASMAN GAINES, etc.

No appeal is allowed from the parish court to the Supreme Court, except in probate matters where the amount involved is above five hundred dollars.

APPEAL from the Parish Court of Rapides. *J. H. O. Barlow*, Parish Judge. *W. B. Hyman*, for plaintiffs and appellees. *R. A. Hunter*, for defendants and appellants.

HOWE, J. This court has no jurisdiction of appeals from a parish court except in probate matters, where the amount in dispute shall exceed five hundred dollars. Constitution, article 88; 22 An. 465.

Appeal dismissed.

Nancy Draughon et als. v. Quillen et als.

No. 3233.—NANCY DRAUGHON et als. v. AVERY B. QUILLEN et als.

The same person can not be the agent of two parties in the same transaction, when their interests are conflicting nor when the agent has a personal interest in the transaction adverse to either of them. Therefore, if a party has signed an obligation as surety for another, who afterward dies before its payment, and the surety becomes the administrator of his estate under appointment by the court, and by an agreement with the heirs he is appointed to compromise and pay the debts of the succession, such person, holding representative positions of different parties who have opposing interests in the succession, can not represent them both in a compromise with one of the creditors of the succession he represents.

The transferee of a judgment against a succession, who holds it by virtue of a transfer made by the agent of the heirs and administrator of the estate, which said agent acquired the judgment by compromise with the creditor, can only recover from the succession, on such judgment, the amount which the agent and administrator paid the judgment creditor for it.

A PPEAL from the Sixth District Court, parish of St. Helena.
Ellis, J. Race, Foster & E. T. Merrick, for plaintiffs and appellees.
W. B. Kemp and Julius E. Wilson, for defendants and appellants.

LUDELING, C. J. On the twenty-fourth day of November, 1860, Francis Quillen acquired by purchase a certain tract of land, with the improvements thereon, consisting in part of a saw mill, grist mill, etc., for the sum of \$4400, payable in four equal installments, for which he gave his notes, with A. B. Quillen, his father, as security, and a mortgage and the vendor's privilege were retained to secure the punctual payment of the price. The purchaser died in 1863 and A. B. Quillen was appointed administrator of the succession. The heirs of Francis Quillen are his brothers and sisters and his father, A. B. Quillen. It appears from the evidence in the record that arrangements were being made to compromise the debts and that A. B. Quillen was intrusted with the duty of effecting a settlement of the affairs of the succession, and to that end he was empowered by a special power of attorney to cancel mortgages in favor of the heirs and to mortgage certain portions of the lands of the succession.

One of the notes given for the price was acquired by C. T. Buddecke, and he obtained a judgment against the succession and A. B. Quillen *in solido* for the amount, \$1100, with eight per cent. interest from its maturity, in November, 1868. In November, 1869, A. B. Quillen proposed to the attorney of Buddecke to pay \$600 and costs of suit in full satisfaction of the judgment. This proposition was communicated to Buddecke who instructed the attorney to accept the offer, provided the money was paid within fifteen days. Within that space of time Quillen paid the money, and the attorney, at the request of the said Quillen, agent and administrator, made a transfer of the judgment to Mrs. Quillen, the wife of said A. B. Quillen, who had an execution issued and caused to be seized and to be advertised for sale the land and improvements belonging to the succession. This sale was enjoined by the plaintiffs in this suit. There was judgment in

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favor of the plaintiffs, reserving to Mrs. Quillen her rights to recover the money paid by her husband in satisfaction of the judgment, as the money so used was her separate property.

The judgment appealed from is correct. The attorney who signed the transfer had no authority to sell but to compromise the debt by receiving a part thereof in full satisfaction. This is what Quillen proposed and what Buddecke accepted. And he could not alter the nature of the contract by the mere form of the receipt which he took from the attorney.

If Quillen was acting as the agent of his wife in the matter, while he was the administrator of the succession and the agent of the heirs, his conduct was obnoxious to censure.

The same person can not be the agent of two parties in the same transaction when their interests are conflicting, much less when he has a personal interest adverse to that of one of them. The law exacts of those acting in a fiduciary character the utmost good faith.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 3195.—JAMES A. HOLMES v. PAULIN DEPLAIGNE

It is not necessary that the answer, setting up the plea of payment, should specify the amount paid and every circumstance of the time and place of payment. Therefore evidence is admissible under the general allegation of payment to show the amount paid and the time and circumstances of the payment.

A PPEAL from the Seventh District Court, parish of Pointe Coupée. *Miller, J. Thomas H. Hewes and Samuel J. Powell*, for plaintiff and appellee. *A. L. Mahondean*, for defendant and appellant.

This case was tried by a jury in the court below.

WYLY, J. The plaintiff sues to recover \$1000, the amount which he alleges is due him on a verbal contract to take down certain machinery which the defendant purchased from Mrs. L. J. Fort in the parish of West Feliciana, and to put it up on the plantation of the defendant in the parish of Pointe Coupée, and to serve as the engineer of the defendant in taking off his crop of 1869. He also sues on the account made part of the petition.

The defendant pleads the general denial, and, further answering, admits that in the month of September, 1869, he made a verbal contract with the plaintiff, by which the latter obligated himself to take down and to do all necessary work to put up again on the plantation of the defendant the machinery purchased by him, mentioned in the plaintiff's petition; that the price for said work, including all the items charged in the account annexed to the petition, was fixed at

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\$1000, without any kind of extra charges for work to be performed by the said plaintiff. He admits that he purchased from the plaintiff certain lumber worth about \$20. He further represents that through error he paid to the said plaintiff the sum of \$155 50 "over what was due him, to wit: \$1000, which he has a right to claim and does hereby claim in reconvention."

The court gave judgment on the verdict of a jury for \$1400 against the defendant, and he has appealed.

Our attention is directed to a bill of exceptions taken by the defendant to the ruling of the court refusing to permit him, after (by motion) withdrawing his demand in reconvention, to introduce proof that he had paid the plaintiff \$1000 "on the ground that the answer did not specify any particular amount paid and every circumstance of time and place."

It was not necessary, in the implied plea of payment in the defendant's answer, to specify the amount paid and every circumstance of the time and place of payment. The bill of exceptions was well taken.

It is therefore ordered that the judgment of the court *a qua* be avoided and annulled, and it is now ordered that this cause be remanded for new trial with instructions that the defendant be permitted to introduce proof in support of his plea of payment of \$1000. It is further ordered that appellee pay costs of this appeal.

No. 3220.—FIELD F. MONTGOMERY v. ALL THE WORLD.

The parish court that has granted an order of sale of property belonging to a succession, has jurisdiction of a monition suit by a purchaser of the lands sold under its orders. The party opposing a monition, is, for all legal purposes, the plaintiff in the action, and he must, therefore, establish his averments by proof.

APPEAL from the Parish Court, parish of Madison. *Crawford*, Parish Judge. *E. D. Farrar*, for plaintiff and appellant. *James T. Coleman*, for opponent and appellee.

WILY, J. The plaintiff, the purchaser at probate sale of certain property sold by the administrator of the succession, of William De Griffin, under order of the Parish Court, of the parish of Madison, sues out a monition and seeks to have his title confirmed and homologated. Mrs. Eugenia Rossman, wife of Charles B. Allen, claiming to be the universal legatee of said William De Griffin, opposed the monition on the grounds that the order under which the sale was made, was informal and void as against her; that the court granting it was without jurisdiction, the claim of the creditor demanding the sale being for \$4600, exclusive of interest, an amount beyond the jurisdic-

Montgomery v. All the World.

tion of the parish court; that there were "irregularities, illegalities and other defects in the proceedings, advertisements, and in the time and manner of the sale of said lands, which will be shown on the trial of this opposition;" and that a devolutive appeal has been taken from the decree ordering the administrator to make the sale.

This opposition was maintained and the plaintiff has appealed.

The evidence shows that the advertisement of the monition was sufficient, that the property was correctly described, and the price at which it was sold was truly paid.

If the recitals of the deed of sale made by the administrator were untrue, it was incumbent on the opponent to show it.

The party opposing a monition is to all legal intents the plaintiff, and must establish his averments by proof. *Fortier v. Zimple*, 6 An. 54.

The court ordering the sale had jurisdiction. It was granted by the parish court on the application of an acknowledged creditor, under articles 990, 991 and 992 of the Code of Practice.

The irregularities in the sale complained of by the opponent have not been proved.

It is therefore ordered that the judgment of the court *a qua* be avoided and annulled, and it is ordered that there be judgment for the plaintiff, confirming and homologating his title to the following lands in the parish of Madison, to wit: "Section three (3) and lots four (4), five (5) and (6), in township fifteen (15), north of range fourteen (14) east, containing eleven hundred and forty-two (1142) acres.

It is further ordered that appellee pay costs of the appeal.

No. 3242.—SUCCESSION OF MARY SMITH, HENRY NEWELL, Opponent *v.*
SALLIE P. SMITH.

A notarial act executed by the wife, whereby she agrees to postpone the rank of her mortgage on the property of her husband to that of a creditor, is null and of no effect as against her, if the evidence shows that she signed it under threats made by her husband. In a case like this, where a creditor is seeking to enforce a subsequent mortgage on the ground that the wife, who holds the prior mortgage, has postponed her preference to him, it is incumbent on the creditor to show that the postponement was her own voluntary act. The fact that no threats were heard by the notary at the time of signing the act of postponement of the wife's mortgage to that of the creditor, does not impair or weaken the statements of the wife that she was compelled to sign the act under threats of her husband that he would drive her off the place if she did not sign it.

APPEAL from the Parish Court of East Baton Rouge. *Posey, J.*
Andrew S. Herron and Greves & Dupree, for opponents, appellees.
B. E. Chaney, for administrator, appellant.

TALIAFERRO, J. Upon a tableau filed by the administrator of the estate of Mary Smith, a claim of Sallie Smith, a creditor, was placed and assigned a rank by priority of mortgage superior to the mortgage

of Newell who opposed the tableau on that account. The opposition was sustained and Mrs. Smith has appealed.

The facts seem to be that the mortgage of Sallie Smith stood originally first in rank on the books of the mortgage office of that parish; that she waived and postponed her mortgage in favor of Newell so as to let his mortgage take precedence, and that that operation took place in this wise: Newell, a merchant, made advances of supplies to Mary Smith, and Alexander Smith, her agent, to enable her to make a crop in the year 1867. Newell at the end of the year received nothing in payment for his advances, accepted a note made payable first November, 1868, secured by what he was informed was a first mortgage on his debtor's plantation. He advanced supplies again for the year 1868, taking another mortgage in February of that year, to secure himself. Finding afterwards that Mrs. Sallie Smith had a mortgage on the same property of prior rank to his mortgages, he threatened Mary Smith and Alexander Smith, her agent, and the husband of Sallie Smith, that unless he was given the first mortgage he would institute proceedings against Mary Smith for obtaining goods under false pretences. Accordingly Sallie Smith executed an act by which her mortgage was postponed to that of Newell. Sallie Smith states under oath as follows: "I did not execute and sign the act of relinquishment of first mortgage in favor of Henry Newell, of my own free will and accord. My husband made me do it. I refused to do so but my husband said I must do it. My husband told me that if I did not sign it, Mr. Newell would institute a criminal prosecution against Mrs. Mary Smith. I derived no benefit from the supplies received from Newell, was not here at the time, but at Jackson. Mrs. Mary Smith was my husband's mother."

Cross-examined.—"My husband threatened me when Dupree and Mr. McGrath came out for me to sign; no one present at the time he threatened me, but I told his niece and his mother. My husband told me if I didn't sign I should not stay on the place. Do not remember what else he told me. I knew at the time that Newell had furnished provisions to Mrs. Mary Smith. My husband lived at Mrs. Smith's at the time the mortgage was given to Mr. Newell, and at the time of the relinquishment I was also there. We came there in December, 1867."

If fraud and dishonesty were practiced upon Newell, he has utterly failed to show that this married woman had any participation whatever in it. There is nothing whatever to contradict her statements in regard to the duress under which she was placed, and the compulsion under which she signed the act giving precedence to Newell's mortgage. McGrath, the notary before whom the relinquishment was signed, testified that the act was read to all the parties and that all seemed to know what he came for, and adds that "if there were any

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threats it was not in his presence." The fact of no one being present when the threat was made, as stated by the wife, that she should not stay on the place if she refused to sign the act, it is urged, renders her testimony weak and shadowy. We do not so regard it. Threats of that kind are not likely to be made in public, for the purposes for which they are made would thereby be more likely to be defeated. Certainly no consideration was received by Sallie Smith for postponing her rights on Mary Smith's property to those of Newell. Her mortgage was of record prior to the time of the execution of those in favor of Newell. He therefore, on legal contemplation, had notice of its existence. It was, however, no impediment to his exercising his privilege upon the crop of 1867, which he complains was run off and his lien thereby lost. His lack of diligence and losses resulting therefrom should not be compensated at the expense of the party with whom he is contesting when he fails to show that that party contributed in any manner to the injuries he complains of. In requiring the wife's mortgage to be postponed in his favor he appears to have been willing to inflict wrong upon another in order to repair wrongs done upon himself. We are of the opinion that the act of relinquishment executed, as the testimony shows, under compulsion and against the will of the party executing, is null and void.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed. It is ordered, further, that the opposition of Newell be overruled and dismissed; that the mortgage debt of Sallie Smith against the succession be recognized as entitled to priority of mortgage on the property mortgaged; and that the administrator's tableau be homologated, the costs to be paid by the succession.

No. 3134.—DENNIS LYNCH, etc. v. Heirs of HUGH LYNCH.

A donation *inter vivos* of the usufruct of an immovable must be in writing. C. C. 1523. Parol evidence is, therefore, inadmissible to establish a verbal donation to the usufruct of a lot of ground.

To constitute a valid donation of a usufruct, the donor must be capable of acquiring the property at the time the donation takes effect. Therefore, a donation of a usufruct made in favor of a slave is void and of no effect.

APPEAL from the Ninth Judicial District, parish of Rapides. *W. B. Hyman*, attorney at law, judge *ad hoc*, in place of Osborne, J., recused. *Ryan & White*, for plaintiff and appellant. *T. O. Manning*, for defendants and appellants.

This case was tried by a jury in the court below.

LUDELING, C. J. The plaintiff alleged that he was formerly the slave of Hugh Lynch, who died in Rapides parish; that, in considera-

Dennis Lynch, etc. v. Heirs of Hugh Lynch.

tion of long and faithful service to him, said Lynch placed petitioner in possession of a certain lot of ground in the town of Alexandria, and gave him the usufruct of the lot and buildings thereon during petitioner's life, and that said Lynch bequeathed the usufruct of the lot and buildings to him by his last will. He further alleges that the heirs of Hugh Lynch had advertised the lot and buildings aforesaid for sale as a part of the property of the succession of Hugh Lynch, and he obtained an injunction to prevent the sale. The case was tried by a jury, who rendered a verdict in favor of the plaintiff, and the defendants have appealed.

On the trial, the plaintiff offered several witnesses to prove that the usufruct of the square of ground and house mentioned in the petition had been verbally given to him. The defendants objected to this testimony, on the grounds that the donation of the usufruct of immovable property could only be made in writing, and that a verbal donation could not be legally established. The objection was overruled and the testimony was received, and the defendants reserved a bill of exceptions.

The ruling was erroneous. Article (462) C. C. declares: "Incorporeal things, consisting only in a right, are not of themselves strictly susceptible of the quality of movable or immovable, nevertheless they are placed in one or the other of these classes, according to the object to which they relate, and the rules hereinafter established." Article (463) says: "The following are considered as immovable, from the objects to which they apply: The usufruct and use of immovable things; a servitude established on real estate," etc. And article (1523) declares: "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or incorporeal things, such as rents, rights, credits or actions, *under the penalty of nullity.*"

Therefore, the objection should have been sustained and the testimony excluded. And as the plaintiff offered no other evidence to sustain his pretensions, there must be judgment against him on this ground, if there were no other. But the record shows that the plaintiff had not the capacity to acquire the property in question, either at the time it is alleged the verbal donation was made or when Hugh Lynch died, and that his pretensions are without the slightest foundation in law.

It is therefore ordered and adjudged that the judgment of the lower court be reversed, that the verdict of the jury be set aside, and that there be judgment in favor of the defendants dissolving the injunction, with one hundred dollars damages and costs of both courts.

No. 3154.—CATHERINE M. BERRY, Wife, etc. v. THOMAS D. MARSHALL.

A mortgage is not prescribed so long as the primary obligation is in force, notwithstanding it has not been reinscribed within ten years.

A private agreement between the maker of a note in favor of the wife of another and her husband to the effect that her husband, as the agent of his wife, was authorized to receive payment of the note, is inadmissible in evidence on the trial of a suit to enforce payment of the note.

Nor is the evidence of a witness that he paid one thousand dollars, by direction of the maker of the note, to the husband, as the agent of his wife, admissible on the trial of a suit by the wife to recover the amount of the note as her separate property, because, if admitted, it would not prove that the husband was authorized to receive the money for his wife, and therefore, if the payment to the husband were proved, it would not prove that it inured to the benefit of the wife who was seeking to enforce the payment of her separate claim.

A PPEAL from the Seventh Judicial District, parish of Avoyelles. *Miller, J. T. Overton*, for plaintiff and appellee. *Waddill & Barbin*, for defendant and appellant.

LUDWIG, C. J. This is a suit against the maker on a note secured by a mortgage. The defense is payment and the plea that the mortgage had prescribed by non-reinscription within ten years.

As the suit is against the defendant who is in possession of the mortgaged premises, we do not perceive what difference it would make to defendant if the mortgage had perempted. It can not be prescribed so long as the primary obligation exists. But the mortgage had not *perempted*, as ten years had not run since its registry.

On the trial, the defendant offered a private agreement between himself and his father, the husband of the plaintiff, for the purpose of proving the agency of the plaintiff's husband and authority to receive payment on the note, which was objected to and excluded on the ground that it was *res inter alios acta* and totally irrelevant. The ruling was correct.

Defendant offered the testimony of J. U. Payne, taken by commission, to prove that the firm of Payne, Huntington & Co. had paid Roger B. Marshall one thousand dollars, as the agent of his wife, by sanction of defendant, which was objected to as irrelevant. The objection was sustained, and the testimony was rejected. We think the judge *a quo* was right in saying the evidence was irrelevant, for, admitting the firm aforesaid did pay the sum stated to the husband, supposing him to be the agent of his wife and authorized to receive the money, that does not prove the fact in question—the authority of the husband to receive the money for his wife. She was separated in property from her husband and had the administration of her own affairs, and the money paid to her husband is not shown to have inured to her benefit; in fact, the contrary is sworn to by the wife, and the note was not in the possession of the husband. *Pinckney v. Mulhollon*, 6 R. 40; 10 M. 310; 4 An. 526, *Pew v. Labythe et al.*

Catherine M. Berry v. Marshall.

Another bill of exception was taken to the ruling of the judge *a quo*, excluding the testimony of William Taliaferro and Thomas D. Marshall, offered to prove that plaintiff's husband acted as her agent in paying taxes and other debts and in collecting notes and other debts due by her. We fail to discover the value of this evidence, if it were in the record. Because A has authority to collect a certain note or a dozen notes due B, it does not follow that he has a right to collect any other notes, not in his possession or under his control. An authority derived by implication can not be extended. The possession of the note is the authority of the agent to collect it, if he act under an *implied* and not an *express* mandate. There is no error in the judgment.

It is therefore ordered that the judgment of the court *a qua* be affirmed, with costs of appeal.

No. 3172.—C. H. SLOCOMB v. JOHN R. WILLIAMS.—Third Opposition of W. E. LEVERICH, Curator of E. J. WALSH.

A third party can not be permitted to claim the proceeds of the sale of property and at the same time and in the same action attack the legality and regularity of the sale itself.

Questions of fraud and simulation by which a judgment has been obtained can not be examined by the Supreme Court if only made for the first time in the petition for an appeal. Constitution, article 74.

A third opposition, founded on a judgment, can not be maintained if more than ten years have elapsed since its rendition and it has not been revived. In such a case the plea of prescription will be maintained, and the third opposition will be dismissed.

APPEAL from the Ninth Judicial District, parish of Rapides. *Orsborn, J. T. C. Manning*, for plaintiff and appellee. *H. S. Losee*, for third opponents, appellants.

LUDELING, C. J. C. H. Slocomb, having obtained a judgment on mortgage notes against John R. Williams with recognition of his mortgage, caused the lands mortgaged to be seized and advertised for sale. On the second of October, 1869, Leverich, curator, filed a third opposition, claiming to be entitled to be paid by preference out of the proceeds of the sale. On the same day the property was sold, and George Jonas, being the last and highest bidder, claimed the right to retain in his hands the amount of two special mortgages which were older than the mortgage under which the sale was made, offered to pay the remainder of the price in cash to the sheriff, and demanded a title. The sheriff refused. The purchaser took a rule on him to compel him to make the title. After hearing in chambers, the judge ordered the sheriff to make a title to the purchaser.

Some days after this the third opponent took a devolutive appeal from this order on the rule against the sheriff. In his petition of appeal, the third opponent alleges numerous grounds for annulling the order, but as these issues were not made before the court *a qua*, and

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this court has not original jurisdiction, we can not notice them, even if they were not inconsistent with the allegations contained in his petition of opposition. One can not be permitted to claim the proceeds of the sale and at the same time attack the legality or regularity of the sale.

The Louisiana State Bank also filed a petition, wherein it alleges that the property was sold for much less than its value, and that the parties concerned in the sale colluded together to defraud said bank and other creditors; that the order or judgment was *ex parte*, erroneous, null and void, and the sale was illegal, "simulated, fraudulent, null and void," and therefore it prays for an appeal.

How these questions can be passed upon by this court, when made for the *first time in a petition for an appeal*, it is difficult to perceive. The motion to dismiss the appeal of this party, on the ground that the appeal bond is not signed by any surety, must prevail. C. P.

After these irregular proceedings on the part of the bank and Leverich, the third opposition filed by Leverich, curator, was fixed and called for trial. The third opponent objected and took a bill of exceptions to the ruling of the court ordering the trial to be proceeded with, on the ground that an appeal had been taken from the order rendered on the rule against the sheriff. It can hardly be necessary to say that the objection was frivolous.

On the merits of the opposition, it will be necessary to notice only one of the four grounds set up against the pretensions of the opponent, and that is that the judgment itself is extinct. By Leverich's own averment it appears the judgment was recorded on the thirty-first of October, 1855, and it has never been *revived*. The plea of prescription of ten years must be sustained, and the opposition dismissed.

It is therefore ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 1870.—P. POUTZ v. THEARD BROTHERS.

A merchant, who purchased a lot of cotton in New Orleans, classed as low middling by his own agent, who afterward shipped it to Havre, France, and sold it as low middling, is not entitled to a reclamation from the vendor in damages for false packing, by which the inside of the bales is inferior in quality to that of the outside.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. A. & M. Voorhies*, for plaintiff and appellee. *J. Ad. Rozier* and *E. H. McCaleb*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sues defendants for damages sustained in a purchase of cotton which he alleges was fraudulently packed, the cotton on the outside of the bales being of good quality, while the interior was composed of trashy, dirty, rotten and inferior

Poutz v. Theard Brothers.

cotton. The answer is a general denial. The plaintiff had judgment against the defendants *in solido* for \$1072, with legal interest from judicial demand. The defendants appealed.

This case is very similar in its character to that of Poutz v. Jones, recently decided by this court. In this case, like that, the cotton was shipped to Havre in France, and the testimony of witnesses residing there was taken under commission. The defendants have in the record evidence to show that the cotton alleged to have been fraudulently packed was composed of "sample" cotton, and that it was so represented to the broker who bought for the plaintiff. One of the defendants is positive and emphatic in his testimony that these samples in packing were not placed to show a better quality outside than in the inside; that all the cotton in these bales was sound cotton; that there was no false packing and no unsound cotton put in; that this is the first reclamation made against defendants' pickery for false packing, etc. The testimony of the foreman of the pickery is much to the same effect. Some other testimony relating to the mode of putting up sample cotton, difference in price between sample and original cotton, is added on the part of the defendant, but which has but little bearing on the point at issue.

Now, on the other hand, two of the Havre merchants to whom the cotton was shipped, swear directly the reverse of what the defendants and their foreman did. One of these merchants says: "Of the lot of forty bales marked H B, thirty were opened and their interior found to be composed of rotten cotton, of bad quality, full of earth, and of entirely inferior quality to the upper and lower layers, or the rest of the cotton composing the bale." The other merchant says: "Of forty bales marked H B, thirty bales, on being examined, were found on the outside to conform to the cotton invoiced, but the interior of these bales was mixed cotton, dirty and of a very inferior quality." These merchants, it is shown, were interested in the matter, the shipment being made on joint account of the merchants and the plaintiff.

Three sworn cotton brokers of Havre testified in the case. These men had no interest whatever in the controversy. One of these brokers says: "On opening the thirty bales, we found the interior of each to be composed of bad cotton, trash, store sweepings, etc. The four sides and the ends of the bales contained one layer of cotton of fine quality, and the bad cotton, trash, etc., inside depreciated the value of the bales in the estimation of myself and colleagues fifty centimes or ten cents gold per kilogram, or five cents gold per French pound." Another of the brokers testifies to the same effect. The third is not explicit. He says he recollects having examined several lots of cotton shipped by the Expounder, some of which were very bad, but after the lapse of time could not recollect the particulars of

} *Poutz v. Theard Brothers.*

the examination. The plaintiff's own evidence corroborates that of the merchants and the brokers. We think the plaintiff has fully made out his loss in the transaction, and that the judgment of the lower court does justice between the parties.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs in both courts.

ON REHEARING.

HOWE, J. The evidence in this case shows that the plaintiff bought bales of "samples" of cotton from defendants in New Orleans at the price of "samples;" that the plaintiff's agent classed them as "low middling;" that the plaintiff shipped them to Havre invoiced as "low middling," sold them there as "low middling," was forced to pay a reclamation, but after paying it still realized in Havre the price of "samples."

It was the plaintiff's agent in New Orleans and not the defendants who classed the property as "low middling;" it was the plaintiff and not the defendants who invoiced and shipped it as "low middling;" it was the plaintiff and not the defendants who sold it in Havre as "low middling."

The manner, therefore, in which the bales were put up, whatever may be thought of it, inflicted no legal damage on the plaintiff. He bought "samples" here and realized the price of "samples" in Havre. The failure of his plan to sell the cotton as "low middling" can not be attributed to the defendants.

It is therefore ordered that our judgment heretofore rendered be set aside. It is further ordered that the judgment appealed from be avoided and reversed, and that there be judgment for defendants with costs in both courts.

No. 3247.—J. A. PAYNE *v.* E. SPILLER, Administrator.—WARREN & CRAWFORD, Intervenors.

Privileges in favor of the furnisher of supplies to a plantation spring only from the law that confers them. They can not be the subject of contract. An acknowledgment of the administrator that the creditor has a privilege on the crop made by the estate which he is administering can not, therefore, be recognized as conferring a lien on the cotton made on the place, unless it be shown that he, the creditor, has furnished the supplies to make it.

APPEAL from the District Court, parish of Livingston. *Ellis, J. E. J. Ellis*, for plaintiff and appellee. *T. C. W. Ellis*, for defendant and appellant. *W. B. Kemp*, for intervenors and appellants.

HOWELL, J. Plaintiff sues for the balance of an account for supplies and cash advanced to make the crop of 1867, and claims a privilege on the proceeds thereof.

Payne v. Spiller, Administrator—Warren & Crawford, Intervenor.

To this demand the administrator pleads a general denial, and claims in reconvention twenty-one bales, or the proceeds, which were inventoried in the warehouse of plaintiff as the property of the succession, and were sold by plaintiff and not accounted for.

Warren & Crawford, judgment creditors of the succession, intervened to resist plaintiff's demand, on the ground that the administrator could not bind the succession, but is personally liable. Judgment was given in favor of plaintiff, and the other two parties appealed.

The record shows that Levi Spiller, before his death, in the early part of 1867, contracted with plaintiff, a merchant in Baton Rouge, for supplies necessary in making the crop of that year; that after his death the arrangement was continued by the administrator; that prior to and soon after Levi Spiller's death, twenty-one bales of his crop of 1866 came into the possession of plaintiff, five thereof having been placed there by himself and sixteen by the widow after his death; the sixteen were shipped by plaintiff to New Orleans, and the net proceeds, with those of one bale of the crop of 1867, credited on the account in suit. The five were seized in the suit of another party, and, by consent, the plaintiff sold them and now holds the proceeds. He claims that the widow and administrator authorized him to sell the sixteen bales of the crop of 1866 and place the proceeds to the credit of the account against the succession, but admits that at the time he received them the succession owed him nothing.

Having contracted, as he testified, with the deceased to advance on and for the crop of 1867, it was not in the power of the widow and administrator to so change the agreement and dispose of the property as to extend the privilege accorded by law to the injury of other creditors of the succession, which is admitted to be insolvent. A privilege of this kind can not be created by contract. It springs only from the law, and must be enforced under the law. The cotton on which plaintiff has a privilege has been sold in the succession, and he must be referred to the account of the administrator to obtain that privilege, and must be held to account for the proceeds of the cotton sold by him upon which he has no privilege. To give him credit for the whole of those proceeds, as set out in his own account, might prejudice other concurrent or superior privileges, as suggested by the administrator.

Under the pleadings and the evidence, the proper judgment will be one in favor of plaintiff for the whole of his account, so far as legal, less the proceeds of one bale of the crop of 1867, with privilege of furnisher of supplies on the proceeds of the crop of 1867, and judgment in favor of the succession ordering him to account for the proceeds of the cotton of 1866, which seem to amount to more than those of the crop of 1867. According to his testimony, he has charged, by contract, twelve per cent. on the whole amount of his account, and, in addi-

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tion, he has charged commission on his account. This is illegal, and he must, under the law, forfeit all interest.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff have judgment against Elisha Spiller, administrator of the succession of Levi Spiller, deceased, for seventeen hundred and nineteen dollars and eighty cents (\$1719 80), with the privilege of a furnisher of supplies on the proceeds of the crop of 1867, and costs in the lower court, to be paid in due course of administration. It is further ordered that on the reconventional demand of defendant, there be judgment ordering plaintiff to pay to defendant any surplus in his hands of the proceeds of the twenty-one bales of cotton of the crop of 1866 over those of the crop of 1867, coming to him by virtue of the privilege accorded to him herein, without prejudice to the rights of others thereon. It is further ordered that the intervention of Warren & Crawford be dismissed, at their cost; plaintiff and intervenors to pay cost of appeal.

No. 3092.—ELIZA CORRIE, Testamentary Executrix, v. Estate of JAMES BILLIU.

A promissory note that has not been properly stamped with the required amount of internal revenue stamps can not be admitted in evidence on the trial of the case, nor can the judge who is presiding authorize the plaintiff to stamp it in his presence. In such a case the note must be stamped by the revenue collector of the district, and the fine must be either paid or remitted by the collector before the note can be received in evidence. 14 U. S. Statutes at Large, page 1.

A PPEAL from the Third District Court, parish of Lafourché. *Train, J. Bush & Good*, for plaintiff and appellee. *E. W. Blake*, for defendant and appellant.

HOWELL, J. This is an action upon two promissory notes, to which the defense is that one of the notes is prescribed and the other is dependent on a condition reprobated by law and not yet happened. A record from the United State Provisional Court for Louisiana was offered in evidence to show interruption of prescription, and was objected to on the ground that said court was not known to the law. The objection was properly overruled. See the case of *Burke v. Tregre*, 22 An. 629.

Objection was made to the introduction of the second note, because it was not stamped according to law; and to the ruling of the judge *a quo*, permitting plaintiff to affix and cancel the stamp before the court, a bill of exceptions was reserved.

Plaintiff relies on the act of Congress, thirtieth June, 1864, sec. 163 (13 Statutes at Large, p. 295), to sustain the ruling of the judge. This section was repealed by the act of July 13, 1866 (14 Statutes at Large, pages 143-4, section 9), which provides that no written instrument

Eliza Corrie, Testamentary Executrix, v. Estate of Billin.

requiring a stamp shall be used as evidence in any court until stamped as prescribed by law, that is, by the collector of the district upon payment of the penalty or remission by said collector. The objection, therefore, should have been sustained and the note excluded. Without it, there is nothing to authorize judgment for its amount.

It is therefore ordered that so much of the judgment appealed from as relates to the note for \$360, dated March 21, 1864, and due at one year, be reversed, and that as to this note there be judgment against plaintiff as of nonsuit, and that as thus amended the judgment be affirmed, with costs in the lower court; plaintiff to pay costs of appeal.

Rehearing refused.

23	251
48	333
48	766

No. 3137.—T. S. MARIONNEAUX et als. v. POLICE JURY of the Parish of Iberville. F. N. MARIONNEAUX v. POLICE JURY of the Parish of Iberville. F. L. MARIONNEAUX v. POLICE JURY of the Parish of Iberville. THOMAS L. BILLINGS v. POLICE JURY of the Parish of Iberville. F. SILVERT MARIONNEAUX v. POLICE JURY of the Parish of Iberville. (Consolidated.)

If express power is given by law to the police juries to raise money by taxation for building roads and bridges, no other mode of raising the money for that purpose can be exercised by them. Therefore, bonds issued by the police jury for the purpose of raising funds to build a bridge or road are not binding on the parish, because the jury is not authorized by law to issue bonds for such purpose.

A PPEALS from the Fifth District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiffs and appellees. *Zenon Labauve, J. H. Rills* and *A. & E. B. Talbot*, for defendant and appellant.

WYLY, J. The police jury of the parish of Iberville, in these cases, is sued on its notes given in renewal of certain bonds issued by it on the twenty-sixth day of July, 1859, for the purpose of raising funds to construct certain roads and bridges in the parish of Iberville.

The defense is that with the proceeds of said bonds the police jury purchased slaves to construct said works, and that it was without authority to issue its bonds for said purpose or for any purpose. The court gave judgment for the plaintiffs in these cases, and the police jury has appealed.

We think the judgment erroneous. The powers of police juries are limited, and they can not bind the parishes further than they are authorized to do so by express law. The power to borrow money or to issue bonds as a means of raising it, has not been conferred on police juries. They have the power to raise money by taxation for the purpose of building roads and bridges, and when the means for the exercise of the granted power are given in precise terms, no other

Marionneaux et al., and other cases v. Police Jury of the parish of Iberville.

means for its exercise or for raising funds can be implied. The case of *Emile L. Breaux v. The Parish of Iberville*, lately decided, presented the same question, and we held that the parish of Iberville was not bound on the notes or bonds issued by the police jury for the purpose of raising funds to build roads and bridges. We see no reason to depart from our ruling in that case.

It is therefore ordered that the judgment herein be reversed and annulled, and that there be judgment for the defendant, the plaintiffs paying costs of both courts.

NO. 3140.—CHARLES W. C. WALKER v. ANDREW J. CRUIKSHANK,
Executor.

A proposition of the executor to pay a note against the succession he represents before it is prescribed, if the holder will throw off the interest, is sufficient to interrupt the current of prescription.

APPEAL from the Ninth District Court, parish of Rapides. *Orsborn, J. R. A. Hunter*, for plaintiff and appellant. *Ryan & White*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues the executor of Olcott on a promissory note for \$646 82, dated eighteenth of January, 1862, payable one day after date, with eight per cent. interest from date, and made payable to the plaintiff or order.

The defendant's answer contains a general denial, and he pleads the prescription of five years.

There is a motion to dismiss this appeal on two grounds: First, that the appeal was made returnable to the Supreme Court at Natchitoches at its August term, 1870, instead of New Orleans, as the law directs; second, that the petition of appeal was served upon the defendant in the parish of Grant, where he resides, by a deputy sheriff of the parish of Rapides.

There is no force in the first ground taken. As to the other, there is no evidence in the record showing the residence of the defendant to be in the parish of Grant. The motion to dismiss is overruled.

ON THE MERITS.

The question is as to the plea of prescription. Yarborough, a witness on the part of the plaintiff, testifies that in the spring of 1866 he called upon Cruikshank for payment of the note and that the latter replied: "If you will knock off the interest, I will give you a sight draft for the amount." The witness not being authorized to throw off the interest, declined the proposition. At the time this interview took place prescription had not accrued. The proposition of the defendant to pay the principal of the note surely was a recognition that the suc-

Walker v. Cruikshank, Executor.

cession of Olcott owed it, and consequently an interruption of prescription occurred. A promise to pay the debt was not necessary to interrupt the prescription.

The testimony of the executor is to the effect that he did not promise to pay the note; but his statements are equivocal and evasive, and wanting in that directness and clearness which mark the evidence given by Yarborough. His evidence clearly preponderates.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendant, in his representative capacity of executor of J. H. Olcott, deceased, the sum of \$646 82, with eight per cent. interest per annum from the eighteenth of January, 1862, until paid, and all costs of suit.

Rehearing refused.

No. 3144.—Mrs. L. LAFORET, Widow Beatty, v. EMILE L. WEBER.

The failure of the sheriff to return a writ of *feri facias* within the time fixed by law is presumptive proof of his liability for the debt, but this presumption may be overthrown by evidence going to show that he was authorized by the attorney of the seizing creditor to retain the writ in his hands.

In case of a conflict of testimony between two witnesses on opposite sides of the case, the one testifying directly the opposite of the other about a fact, the opinion of the judge *a quo*, who heard both witnesses, is entitled to great weight, and his decision as to the preponderance of the testimony will be followed by the Supreme Court.

A PPEAL from the Seventh District Court, parish of West Feliciana. *Miller, J. Thomas Butler and Collins & Leake*, for plaintiff and appellant. *Wickliffe & Fisher*, for defendant and appellee.

LUDELING, C. J. This action was brought to make the sheriff, Edward Weber, and his sureties liable for not having returned the *feri facias* within the delay required by law.

The failure of the sheriff to return the writ within the time fixed by law is *prima facie* proof of his liability for the debt, but in this case the sheriff alleged, and offered evidence to establish, a legal excuse—that he acted under the advice and direction of the attorney of the party in whose favor the writ was issued. The sheriff and the attorney alone have testified in this case. The former states positively that the attorney authorized and instructed him to retain the writ in his hands, while the attorney denies it as positively.

The question to be decided being one of fact, the opinion of the judge *a quo*, before whom the witnesses testified, is entitled to great weight. 6 La. 31; 13 La. 412; 3 An. 163; 21 An. 115, 139, 169, 782.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

23	254
120	165

No. 3228.—LEWIS, NAUSON & CO. v. HOMER, REX & TRACY.

If the answers of the garnishee to interrogatories are sufficiently clear and comprehensive to inform the plaintiff of the facts of the case, they will not be overruled in the appellate court on the suggestion of counsel that they are evasive, especially if no motion has been made in the court *a qua* to have them taken as confessed.

The exception to the capacity of the plaintiff must be pleaded in *limine litis*. If the defendant goes to trial on the general issue, it is too late to urge the exception of the capacity of the plaintiff or of the intervenor to stand in judgment.

A PPEAL from the Thirteenth District Court, parish of Tensas. *Hough, J. Farrar & Reeves*, for plaintiffs and appellants. *Julius Aroni*, for defendants and appellees.

HOWE, J. On the sixteenth January, 1867, Charles De Greck & Co. commenced an action against Homer, Rex & Tracy in the district court of Tensas parish, and attached certain assets in the hands of Julius Aroni and J. W. Collier. Property was also attached in possession of other parties. Aroni & Collier, then the attorneys of Homer, Rex & Tracy, had in their hands property belonging to their clients, and in order to release the property attached in the possession of the other parties, a release bond was furnished, with Julius Aroni as surety, with the agreement that the assets in the hands of Aroni & Collier should remain in his possession till the final decision of the case, to indemnify him as such surety in case of liability.

On the first of February, 1867, Lewis, Nauson & Co., the plaintiffs at bar, commenced this suit by attachment against the same defendants, and made Aroni & Collier garnishees. Julius Aroni answered, making a full statement of the assets in his hands belonging to defendants, and the conditions under which he held them. J. W. Collier adopted the answers of Aroni. Chester H. Krum, as assignee in bankruptcy of Rex and Tracy, intervened to claim their share of the property attached.

The court below gave judgment in favor of plaintiff against Homer for one-third of the debt, and against Aroni & Collier for one-third of the cash admitted to be in their hands subject to the settlement of the suit of De Greck, firstly above mentioned, and in favor of Krum, assignee, for the balance of the cash in the garnishees' hands, with the same condition.

The plaintiffs appealed, and state in this court that they make but two points: First, that they are entitled to judgment for their whole claim against Aroni & Collier because their answers were palpably evasive; second, that the judgment in favor of Krum was erroneous.

First—We see nothing evasive in the answers of the garnishees. They contain a full, plain, perspicuous statement of the property and claims of the defendants in the hands of the garnishees. The question propounded was: "Are you indebted in any manner to the firm

• Lewis, Nauson & Co. v. Homer, Rex & Tracy.

of Homer, Rex & Tracy, or have you any property, assets or claims in your hands or under your control belonging to the said firm?" It is true that in strictness of grammar, the clause of this question referring to indebtedness is not clearly responded to; but it is quite evident that the plaintiffs and their counsel were fully informed of the facts of the case by the answers. They made no allegation of indebtedness; made no motion to take the interrogatory as confessed, and on the trial offered the answers as a part of their own evidence. It was over the assets revealed by these answers that the contest was waged, and the point now presented seems an after thought.

Second—In answer to the intervention of Krum, the plaintiffs pleaded first a general denial, and then an exception to his capacity as assignee. They then went to trial on the merits, without requiring a decision on this dilatory exception, and thus waived it. 11 An. 633; 14 An. 520. Moreover, the evidence introduced, without any objection, makes it certain that Rex and Tracy were bankrupts before the case was tried, and reasonably certain that Krum was their assignee. The second point, then, that Krum's capacity was not established, and that the judgment as to him was erroneous, is not well taken.

Judgment affirmed.

Rehearing refused.

No. 3166.—T. H. J. RICHARDSON v. R. A. HUNTER.

A judgment rendered against a party whose domicile and residence is not in the parish where the court is held, is null and void, because the court is without jurisdiction *ratione personæ*. In such a case consent of the defendant can not give jurisdiction. Act of 1861, amending Article 162 C. P.

APPEAL from the Ninth Judicial District, parish of Rapides. *Orsborn, J. Wm. A. Seay*, for plaintiff and appellee. *R. J. Bowman*, for defendant and appellant.

REPORTER.—This case was first before the Supreme Court at Natchitoches in August, 1869. At that term of the court a rehearing was granted and the cause was remanded, with instruction to the court *a qua* to try the question of the domicile of the plaintiff, who is seeking to annul a judgment against him on the ground that he was not a resident of the parish where the suit was brought at the time it was rendered. On the new trial in the court below the domicile of the plaintiff in the action of nullity was found to be in a different parish from that where the court was held and that where the judgment was given. An appeal was again taken by the defendant and the judgment of the court *a qua* annulling the judgment was again affirmed.

TALIAFERRO, J. This is an action to annul a judgment rendered against the plaintiff in favor of the defendant. The judgment sought to be annulled was rendered by the judge of the Ninth District, sitting in and for the parish of Rapides, at the March term, 1866. In that

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suit the defendant, T. H. J. Richardson, the plaintiff in this action to annul, was sued as a resident of the parish of Rapides, and citation was served upon him in the parish of Sabine by a deputy sheriff of the parish of Rapides. An exception was filed and sustained. Before the adjournment of the court for the term an agreement was made between the attorney of Hunter and Wilson Richardson, holding himself out as the agent and attorney in fact of T. H. J. Richardson, whereby it was settled that judgment should be rendered against T. H. J. Richardson for \$3251 72, with stay of execution respectively on one-third of the debt one year, on one-third two years and on the other third three years. The original indebtedness of Richardson to Hunter, it seems, was by note for \$4898 54, due December 23, 1861, and upon an open account for \$543 02, running from May, 1861, to June, 1862. This indebtedness, by the compromise and consent judgment, was reduced to \$3251 72, and to become exigible as already stated in one, two and three years. The judgment thus rendered on the twelfth of March, 1866, the plaintiff in the present action filed his suit to annul on the fourth September, 1867. The defense is that the plaintiff's remedy was by appeal from the judgment complained of, and not having availed himself of that right within the year this action of nullity is prescribed and the matter becomes *res judicata*. It is further answered that the judgment was rendered by the consent and at the instance of the authorized agent and attorney in fact of the plaintiff, and that subsequently to the rendition of the judgment the plaintiff has ratified it. On the trial of this action to annul, the lower court gave judgment in favor of the defendant and the plaintiff prosecutes this appeal.

It is not clearly established that W. L. Richardson was the agent and attorney in fact of T. H. J. Richardson. It is shown that in some other judicial proceeding he acted in that capacity, but it is clear that he was without special power to authorize him to represent and bind the plaintiff in the matter of the judgment of twelfth March, 1866. Evidence is introduced to show a ratification of that judgment, but the evidence we can hardly deem conclusive. The plaintiff called on Judge Manning, the attorney of the defendant, Hunter, not long after the term of court at which the judgment was rendered, and thanked him for having treated him with such consideration, and said he was greatly indebted to him for his kindness, speaking in reference to the favorable terms extended to him.

The defendant testified that a letter was shown to him by the plaintiff's attorney, the purport of which was a proposition by the plaintiff to the defendant to accept a transfer of the yearly lease of his land until the judgment should be paid. This proposition, it seems, was declined on the ground that it was too indefinite, as no specific sum

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was named for the annual payments. The proposition expressed in this letter we should rather regard, under the circumstances, as a kind of conditional ratification, which is no ratification at all. The person who assumed to act as the attorney in fact of the plaintiff testified as a witness, that when, a short time after the arrangement was made and the judgment rendered, he informed T. H. J. Richardson of what had been done, he became very angry and requested him to consult an attorney as to whether the judgment could not be avoided. We are not prepared to determine that a full and decided ratification, had there been one, could give validity to a judgment so rendered. The plaintiff and defendant resided and had their domiciles in different parishes. The court was without jurisdiction *ratione personæ*, and the parties could not, by consent, confer jurisdiction. The defendant was not cited and judgment was rendered against him without his knowledge or consent. See act of 1861, amendatory of article 162 of the Code of Practice, and the case of *The State v. Watkins*, 21 An. 273.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, declaring null and void the judgment rendered against him on the twelfth of March, 1866, in the suit numbered one hundred and forty-nine on the docket of the district court for the parish of Rapides. And it is further ordered that the defendant and appellee pay all costs in both courts.

ON APPLICATION FOR REHEARING.

LUDELING, C. J. The application for rehearing is granted, and the judgment of this court rendered on the twenty-third day of August is set aside; and, in the interests of justice, we are constrained to remand this case to the district court to try the question of the domicile of the plaintiff, T. H. J. Richardson.

ON SECOND APPLICATION.

WYLY, J. This is a suit to annul a judgment on the ground that the same was rendered without citation and without the knowledge or consent of T. H. J. Richardson, the defendant therein, by the Ninth District Court, parish of Rapides, which was without jurisdiction *ratione personæ*, the said Richardson being domiciled in the parish of Sabine.

The case was before this court at Natchitoches on the twenty-third day of August, 1869, and the judgment of the lower court annulling the said judgment was affirmed; the case was subsequently remanded

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on the application for rehearing, to try the question of the domicile of T. H. J. Richardson, the plaintiff in this suit and the defendant in the judgment sought to be annulled.

At the second trial in the court below there was judgment for the plaintiff, and the defendant has appealed.

An examination of the evidence satisfies us that the domicile of Richardson was in the parish of Sabine and the Ninth District Court, parish of Rapides, was without jurisdiction *ratione personæ* on the twelfth day of March, 1866, at the time the judgment sought to be annulled was rendered against him.

For the reasons assigned in the opinion of this court on the twenty-third day of August, 1869, it is ordered that the judgment of the court *a qua*, annulling the said judgment, be affirmed, with costs

No. 3206.—LOUISA LANE v. C. ROSELIUS, and J. C. HUGHES, Sheriff.

In an appeal taken from a judgment dissolving an injunction without damages, the surety on the injunction bond having no interest in the appeal is not a necessary party thereto; therefore, the appeal will not be dismissed because the security on the bond is not made a party.

If the thing sold is allowed to remain in the possession of the vendor, the presumption is that the sale is simulated; and, as against third parties, this presumption must be overcome by proof. Therefore, if the evidence shows, as in this case, that the vendor still retained possession of the plantation sold, and that the vendee was without the means at the time of the sale to make the purchase, as set forth in the title, which was placed on record, and also that she had knowledge of the mortgages upon it at the time, the mortgage creditor may be allowed to seize and sell the property without resorting to a direct action to annul the sale.

A PPEAL from Ninth District Court, parish of Natchitoches. *Lewis, J. C. Chaplin & Son*, for plaintiff and appellant. *Jack & Pearson* and *N. O. Myers*, for defendants and appellees.

WYLY, J. The defendants and appellees move to dismiss this appeal because the surety on the injunction bond has not been made party to the appeal, the appeal having been granted on motion and the bond being given only in favor of the defendants.

It is not necessary to mention the surety on the injunction bond in the motion for appeal, nor to cite him; he is a party to the appeal, if taken either by the plaintiff in injunction or by the defendant in injunction.

When the appeal is taken by the defendant, it must be considered as not only embracing the plaintiff but also his sureties on the injunction bond, who by a fiction of law (act twenty-fifth March, 1831), are considered as plaintiffs in injunction. 4 An. 514.

Where the appeal is taken on motion by the plaintiff, as in this case, his sureties on the injunction bond will be considered as parties appellant. 10 An. 347. The motion to dismiss is therefore overruled.

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The plaintiff enjoined the defendants from selling a tract of land known as the "Kingsberry Lane" tract, in the parish of Natchitoches, on the ground that she is the owner of it, having purchased the same by public act from Kingsberry Lane on eleventh May, 1866. She alleges that she paid for said plantation \$2000 cash, and gave her four notes, each for a like amount, maturing respectively at one, two, three and four years from date; and has been from the time of her said purchase to the present time in open and actual possession of the property, residing thereon.

The defendant, C. Roselius, denied generally the allegations of plaintiff, alleged that the plantation seized is really and in fact the property of Kingsberry Lane, his mortgage debtor, against whom he obtained the order of seizure and sale enjoined by the plaintiff; that she is not and never was the owner of said property, that her ownership is only nominal, that the plantation actually belongs to Kingsberry Lane, who has continued the possession thereof, using the name of plaintiff, who is his concubine and former slave, for the purpose of fraudulently concealing his property from the pursuit of his creditors and from seizure and sale under his mortgage. He further alleged that the transfer to plaintiff was simulated, that Kingsberry Lane was at the time insolvent to the knowledge of the plaintiff, and that she knew of the existence of his mortgage. He prayed that the injunction be dissolved, that the title of the plaintiff be declared simulated, that the plantation be declared to belong to Kingsberry Lane and subject to his mortgage, and for \$1000 damages. The court dissolved the injunction without damages, decreed the sale simulated, and that the plantation belongs to Kingsberry Lane, and as such subject to the seizure of the defendant. The plaintiff has appealed.

The evidence shows that the plaintiff and Kingsberry Lane both lived on the plantation before and after the sale, and that they still reside there; that the act of sale from the latter to the former was by notarial act, and it was duly recorded before the registry of the act of mortgage under which the defendants are proceeding. It is also shown that she leased out the land or part thereof in 1866, also in 1867 and 1868.

The witness, Robbins, testifies he was present at the time the act of sale was passed from Kingsberry Lane to Louisa Lane. "He saw \$2000 in twenty dollar gold pieces paid to Kingsberry Lane by Louisa Lane, after having been counted by witness and another witness; the money was lying in the lap of Louisa Lane and she asked some one to count it, and he, witness, was then asked to help count it. He saw more than one note given at the time the act was passed, to the best of his knowledge. He was asked to witness the notes. Does not know how many notes were given, but they were given in part payment for the land.'

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Where the thing sold remains in possession of the vendor, the presumption is that the sale is simulated, and as against third persons this presumption must be overcome by proof. C. C. 2456.

Where the vendor and vendee live on the premises sold, possession follows the recorded title. 3 N. S. 337; 19 L. 349.

The act of sale was in due form and recorded prior to the mortgage under which the defendant claims, and it is proved that part of the price was actually paid and notes executed for the balance. A price was paid, and, although it may be fraudulent, there was a real sale, which must be set aside by a direct action, before the property can be subjected to the writ of the defendant. 19 An. 53; 20 An. 41; 18 An. 732.

Entertaining this view of the case, it becomes unnecessary to pass on the bills of exceptions taken by the plaintiff.

It is therefore ordered that the judgment of the court *a qua* be avoided and annulled, and it is ordered that the injunction herein be perpetuated and that the defendant pay all costs.

ON REHEARING

HOWELL, J. A motion is made to dismiss this appeal, granted on motion in open court, upon the ground that the surety on the injunction bond has not been made a party to the appeal.

The judgment appealed from dissolved the injunction without damages, and made no reference to the surety on the bond. No one complains of the judgment in this respect, and hence the surety can in no way be affected by any judgment which can be rendered on this appeal. Having no interest in the appeal, he is not a necessary party, and the motion must fail.

Further examination of the record has induced a change in our estimate of the evidence in the cause. The defendant, C. Roselius, having a mortgage upon the land of Kingsberry Lane, in the parish of Natchitoches, obtained an order of seizure and sale, the execution of which was enjoined by Louisa Lane, who set up title of anterior date to the registry of defendant's mortgage. The defense is that said title is simulated and fraudulent.

It is satisfactorily shown that Louisa Lane is the concubine and former slave of Kingsberry Lane, and was without means of her own to make the alleged purchase. The studied forms so ostentatiously observed in making the pretended transfer and the two subsequent acts of lease, are, under the circumstances, confirmatory of the presumption against the reality of the transaction, and were apparently adopted as a part of the machinery to accomplish the purpose. Both parties were at the time, and still are, living on the premises, and Kingsberry Lane

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has since acted the part of owner. The effort to show that Louisa Lane possessed sufficient funds or means to purchase and hold such property was a failure, while she was aware of the existence of defendant's mortgage and of the embarrassed condition of her alleged vendor. The evidence objected to was properly admitted under the pleadings.

It is therefore ordered that the decree heretofore rendered by us be set aside, and that the judgment of the district court be affirmed. with costs.

No. 3079.—ISAAC LEVY v. E. B. MENTZ, Sheriff, et als.

23	261
125	165

A mortgage that has not been reinscribed within ten years from the date of first inscription, loses its rank as a mortgage, and the subsequent mortgages on the same property that have not been perempted take rank from their respective dates of registry. 21 An. 204, 427; 22 An. 402.

In the matter of construing and interpreting the statutes of the State respecting the titles to and the liens on real property, the rule is well settled that the courts of the United States will give to such statutes the interpretation which they have received by the State courts. The State courts of Louisiana will not, therefore, be bound by a decision of the Supreme Court of the United States on a question of the registry of a mortgage, under a statute of the State, when such decision is adverse to the construction given to such statute by the State courts.

A PPEAL from Third Judicial District, parish of St. Mary. *Train, J. Cotton & Levy*, for plaintiff and appellant. *Legendre & Poché*, for defendant and appellee.

LUDELING, C. J. Isaac Levy claims to be paid out of the proceeds of the sale of property mortgaged to defendant, on the ground that his mortgage is superior in rank to that of the seizing creditor.

The mortgage, under which Levy claims, originally granted to Gabriel L. Fusilier and other creditors of J. A. Fréré, was recorded on the ninth day of September, 1846, and an act affirmative of and supplemental to the original act was inscribed in the book of mortgages on the ninth of September, 1850, and the original act of mortgage was reinscribed on the eighth day of November, 1865.

The mortgage under which S. Theriat, defendant, claims was recorded on the fourth of February, 1861, and reinscribed on the eighteenth of April, 1870.

Under this state of facts it would seem clear that the plaintiff's mortgage had perempted. "The effect of the inscription of mortgages ceases even against the contracting parties, if the inscriptions have not been renewed before the expiration of ten years, in the manner in which they were first made." C. C. 3369. And it is the "duty of the Recorder of Mortgages, or person acting as such, to cancel and erase, on the simple application in writing to that effect, by the owner, creditor of the owner, or other party interested, all inscriptions of mortgages which have existed or may exist on the records for a period exceeding ten years, without a renewal of such inscriptions," etc. Acts of 1843; Revised Statutes, sec. 450.

 Levy v. Mentz, Sheriff, et als.

We have been referred to a decision of the Supreme Court of the United States, reported in 8 Wallace p. 299, in which that exalted tribunal held that, in Louisiana, knowledge of an existing mortgage was equivalent to, or dispensed with, registry; and the counsel for the opponent earnestly urges that we should follow their interpretation of the laws of Louisiana. It does not appear that the Supreme Court of the United States had their attention directed to article 3369 of the Civil Code, or to the amendment to article 3333. But, be that as it may, it seems well settled that in construing local statutes respecting real property, the federal courts are governed by the decisions of the State tribunals. *Thatcher v. Powell*, 6 Wheat. 119; 8 Peters 220; 9 Cranch 87; 5 Cranch 22; 16 Peters 455; 7 How. 812.

By the failure to reinscribe his mortgage within ten years after its recordation the plaintiff lost his rank, and the mortgage of the defendant took precedence over it. 21 An. 204; 21 An. 427; 22 An. 402. ♦

It is therefore ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 3192.—EXECUTORS OF JOHN BIRD v. THOMPSON, W. BIRD.

The appeal will be dismissed if taken from a judgment that is not signed by the judge, notwithstanding the parties have filed a written consent thereto, because no appeal will lie from a judgment until it is signed by the judge, and the consent of the parties will not cure this omission.

APPEAL from the Fifth District Court, parish of West Baton Rouge. *Posey, J. Samuel P. Greves*, for plaintiffs and appellees. *Barrow & Pope* and *Fuqua & Callihan* and *White & Robertson*, for defendant and appellant.

WYLY, J. We discover in the record two judgments; one rendered on the thirteenth and signed on the twenty-third December, 1869; the other appears to have been rendered on the nineteenth day of December, 1870, and was not signed.

The parties have filed an agreement, in which they state that the appeal herein is from the judgment of the nineteenth December, 1870, and they agree that this shall be considered the true and *bona fide* judgment appealed from, and for which the appeal bond was given; that the judgment of thirteenth December, 1869, was signed through error on the twenty-third of the same month, it having been at the time set aside.

We can not revise the judgment of the court of the nineteenth December, 1870, notwithstanding the consent of the parties, because not being signed it was incomplete. The signature of the judge was essential, and the agreement of the parties can not supply the deficiency.

It is therefore ordered that the appeal herein be dismissed at the costs of the appellant.

No. 3123.—STATE OF LOUISIANA v. CHARLES HEMARD.

23	263
51	581

A person owning a cotton pickery can not avoid the payment of the license imposed on cotton pickeries by the revenue act of 1869, on the ground that he does not use it except for the purpose of picking and cleaning his own cotton, which he has purchased to sell again. In such a case he is as much liable to the State for the license as though he used it for picking and cleaning cotton for other persons for which he charged a commission.

A PPEAL from the Third District Court, parish of Orleans. *Emerson, J. S. Belden*, Attorney General, for the State. *E. Howard McCaleb*, for defendant and appellant.

Howe, J. This is an action to recover a license imposed on the cotton pickery of the defendant. There was judgment for plaintiff, and the defendant has appealed.

The act of 1869, under which the license payable in 1870 is claimed, provides that there shall be levied and collected an annual amount as a license * * * of five hundred dollars * * * from each cotton press, pickery or junk shop. § 3, No. 19, p. 148.

The statement of facts in the record is as follows:

"Plaintiff proved that the defendant was the owner of a cotton pickery on Freret street; that he had at said place the machinery and implements used by cotton pickers. The defendant proved that he used said cotton pickery, machinery and implements solely for his own use and benefit; that he had taken and paid license as a commission merchant during the years 1869 and 1870; that he was accustomed to buy good, bad, wet, damaged and muddy cotton; that when he purchased damaged, injured or unmerchantable cotton, he cleaned and prepared it for market in said cotton pickery, and sold it for his own account; that all the cotton so prepared and cleaned by him in said establishment was his own property; that he constantly and persistently refused to pick and prepare damaged cotton for cotton factors and commission merchants and for other parties; that all the work done by him in said establishment in the year 1869 and 1870 was solely for himself and on his own property."

Witnesses acquainted with the business also testified that the business carried on by defendant differed from that of cotton pickers or keepers of cotton pickeries in two respects, viz:

"*First*—That keepers of cotton pickeries cleansed and prepared damaged cotton for cotton factors, merchants and others, and received a commission or compensation therefor; in other words, that they worked for others and handled the property of others; whereas, defendant worked only for himself and on his cotton, and refused to do this work for others.

"*Second*—That cotton pickers or keepers of cotton pickeries opened the bales of cotton delivered to them by factors and others, picked the cotton, separated the bad from the good, put them up in separate

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packages, bales, etc., and returned them to the factor, merchant or to whomsoever it belonged, and received a commission therefor; that defendant cleansed and prepared damaged cotton bought by him, and after having cleansed, picked and prepared it for market, put it up in such manner as he pleased, and sold it for himself and received the proceeds therefor."

It is urged on behalf of appellant that he does not keep a cotton pickery in the sense of the statute, as quoted, and that he is not therefore liable in this case. We can not assent to this view. The evidence recited above clearly shows that the defendant is the proprietor of a cotton pickery; that he uses it, in the way all pickeries are used, to put damaged cotton in order; that such use is a part of his business or occupation; that he pursues this part of his occupation for the purpose of gain, and that he, therefore, comes entirely within the clause of the statute under which this action is instituted.

Judgment affirmed.

No. 2272.—DR. ARMAND MERCIER v. THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

To enable a party to recover damages for injuries caused him by a collision with a street car, he must show that he exercised a reasonable degree of prudence and caution in endeavoring to avoid the accident. If, on the contrary, the evidence shows that the person injured by such a collision, while the car was in motion on the track, failed to exercise a reasonable degree of prudence, which if he had done the accident would not have occurred, he can not recover damages from the company for the injuries received, either to his person or his property, even though the driver of the car be himself at fault.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. C. Roselius* and *C. Dufour*, for plaintiff and appellee. *W. H. Hunt* and *L. E. Simonds*, for defendant and appellant.

This case was tried by a jury in the court below.

LUDELING, C. J. The plaintiff claims \$10,000 damages for injuries to his person and to his buggy and horse, caused by a collision with one of the cars of defendant in 1867. There was judgment against the defendant for \$7041, and the defendant appealed.

From the plaintiff's own statement in the record, it appears that he was going along Erato street, across St. Charles street, towards the swamp, in his buggy, with the top thrown back, so that he could clearly see all around him; that he was driving at a slow trot; that he crossed the first track safely, but before clearing the second track a car going up toward Carrollton struck the hind wheel of the buggy and broke it, throwing him out and inflicting a wound on the left elbow and injuring two fingers of the right hand; that he saw the car approaching at a fast trot; saw the driver apparently making change,

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with his face turned from him; that he called to the driver of the car to stop, and on perceiving that the driver did not turn or appear to hear him, he called out a second time; that he proceeded across the track leisurely, neither attempting to check his horse or quicken his speed; that when he called to the driver the second time the latter turned, but it was too late, the car was not stopped in time to prevent the accident.

From his own statement it appears the plaintiff saw the danger, and yet he incurred the risk. He could have avoided it by stopping until the car had passed, or by quickening the pace of his horse, but he chose to do neither. He called upon the driver, who did not see the danger, to do what it was his duty to have done. Whether the defendant was in fault or not is not material in this case, as it is clear that the plaintiff's heedless conduct directly contributed to the collision. 9 An. 441; 3 An. 48; *Knight v. Pontchartrain Railroad Company*, 23 An.

It is now well settled that if a party injured might have avoided the accident by the exercise of a reasonable amount of prudence, and he did not do it, he can not visit his own indiscretion or want of judgment upon the other party, even though that party be himself in fault. *Redfield on Railways*, 119, § 117.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the district court be annulled, and that there be judgment in favor of the defendant rejecting the plaintiff's demand, with costs of both courts.

No. 3215.—*L. BLOOM v. T. F. DIXON.*

In the sale of a house and lot, the vendee took a special mortgage on a tract of land belonging to the vendor, to secure himself against a mortgage of a third party standing against the house and lot. The vendee was subsequently compelled to pay the mortgage against the house and lot. He afterward brought suit against the vendor on the special mortgage, to reimburse himself for the outstanding mortgage on the house and lot which he had been compelled to pay. On trial of this suit it was shown that the whole transaction was based on an illicit paper currency commonly called Confederate money.

Held—That the contract having no legal foundation to rest upon, could not be enforced by the courts.

APPEAL from the Fifth Judicial District, parish of East Feliciana. *Poscy, J. Breaux & Fenner*, for plaintiff and appellee. *Kernan & Lyons* and *Charles McVea* and *Cross & Hardce*, for defendant and appellant.

This case was tried by a jury in the court below.

TALIAFERRO, J. The defendant sold to the plaintiff, on the tenth of October, 1863, a house and lot in the town of Jackson, Louisiana, for \$8000. Dixon, the vendor, obligated himself to pay two notes of

Bloom v. Dixon.

\$1000 each given by Kinear, the vendor of Dixon, to Mrs. Hagerman, from whom Kinear purchased the same property. There was a mortgage on the property to secure the payment of these notes. Dixon in his contract with Bloom executed his own obligation in favor of Bloom for \$2080, and secured the payment of it by a mortgage on three hundred and ten acres of land. This was done to secure Bloom against the outstanding mortgage against the property in favor of Mrs. Hagerman. It seems that Dixon paid one of these notes; but the other being unpaid, Mrs. Hagerman proceeded under her mortgage to have the property seized and sold. It was purchased by Bloom, and for the payment of the debt he entered into a twelve months' bond. He then sued Dixon in the present action upon the obligation in favor of Mrs. Hagerman, which he was forced to take up, and prays that the tract of land mortgaged to him as an indemnity be sold to pay the indebtedness incurred by the failure of Dixon to relieve the property sold by him to Bloom from the aforesaid mortgage in favor of Mrs. Hagerman.

The defense is want of consideration and illegality in the contract. In the court below the plaintiff had judgment in his favor, and the defendant has appealed.

It is clear that the transaction was illegal, the price having been paid in an illicit paper money, usually called Confederate money. The defendant swears that he never received anything from the plaintiff or any one else for the property but Confederate money; that the sale and the mortgage to Bloom were made the same day and form one transaction. The witness Reinberg saw the money paid by Bloom to Dixon, and says it was all Confederate money.

The plea of prescription it is not necessary to examine.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, and that the suit be dismissed at plaintiff's costs.

ON APPLICATION FOR REHEARING.

TALIAFERRO, J. Bloom was not subrogated to the rights of Mrs. Hagerman in the note of Kinear, upon which she proceeded to foreclose the mortgage given to secure its payment. Bloom did not pay this note, but permitted the property mortgaged to be sold, and became the purchaser. The note was extinguished by the sale. Bloom was without recourse upon Dixon, because the mortgage given by him on the tract of land in favor of Bloom was for an illegal consideration, and therefore null.

Rehearing refused.

Miltenerger v. Estate of Pipes.

No. 3184.—ARISTIDE MILTENBERGER v. ESTATE OF JAMES W. PIPES.

The heirs of an estate who apply by petition for an appeal from a judgment in favor of a creditor against the estate, must make the estate a party appellee. Otherwise the appeal will be dismissed on motion for want of proper parties.

A PPEAL from the Fifth District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *Favrot, Chamberlin & Lamon*, for defendants and appellants.

HOWE, J. The motion to dismiss must prevail. The judgment was rendered against the "estate of James W. Pipes," on the fifteenth January, 1870. The only appeal before us was taken by petition by certain heirs of Pipes, who had renounced his succession. Even if they had an interest to appeal they have not caused any representative of the "estate of James W. Pipes" to be cited as appellee, and the estate is, therefore, not before us. The citation to "Mrs. Susan Pipes, widow of James W. Pipes," does not bring the succession into this court. The fault is attributable to the appellants.

Appeal dismissed.

Rehearing refused.

 No. 3103.—STATE ex rel. SAMUEL SMITH & Co. v. ANTOINE DUBUCLET,
State Treasurer.

A warrant, issued by the Auditor of Public Accounts in favor of a creditor of the State on the State Treasurer for money due, is not a bill of credit, nor is it such a negotiable instrument as entitles the holder to the protection of the law merchant. An innocent third holder of such paper can not therefore claim the protection of the law merchant against the charge by the State itself that such warrant was obtained through error and fraudulent practices by the original holder on the Auditor of Public Accounts. Nor can the third holder invoke the doctrine of estoppel against the State on the ground that the Auditor, as the fiscal agent of the State, having recognized the validity of the claim and given the warrant of the State therefor, the State was estopped from inquiring whether the consideration for which it was given was good and valid or not.

A PPEAL from Eighth District Court, parish of Orleans. *Dibble, J. Lea, Finney & Miller*, for relators and appellees. *S. Belden*, Attorney General, and *John H. New*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs proceed against the State Treasurer by mandamus to compel him to pay a certain State warrant for \$12,120, which they hold as transferees of one Isaacs, to whom the warrant was issued.

In answer to a rule *nisi*, the Treasurer answered, that at the time the warrant was presented for payment, there were no funds in the treasury wherewith to pay it. That before the warrant was presented he was instructed by the State Auditor not to pay it, as it had been issued through error upon counterfeit coupons of bonds of the State of Louisiana, and had no legal force. That he can only pay out money upon

the order of the Auditor; and, as in this case, when his authority to pay is revoked, he is without power legally to perform the act. The rule was made absolute and the treasurer ordered to pay to the relators the amount of the warrant, and that he pay costs of the proceedings. An appeal from this judgment was taken on the part of the State. It is established clearly that through the fraud and knavery of Isaacs, practiced upon the Auditor, he, through error, issued the warrant upon State bond interest coupons proved to be spurious and forged instruments. The relators, who are bankers and dealers in money, purchased the warrant from Isaacs, and contend that as they acquired ownership of the warrant in good faith and for a valuable consideration, the State is bound to pay them the amount called for by the warrant, whatever may have been the circumstances under which it was issued. They aim to assume the position of innocent third holders, and invoke the principles of the commercial law to protect them. They seem, however, to rely mainly on the doctrine of estoppel. They insist that the warrant having been issued by the properly authorized officer of the State, and being an order by the State through its proper agent for the payment of a sum of money to the payee or to his order, the State thereby acknowledged its obligation to pay the specified sum; and having put the instrument into circulation as a negotiable one, the State is estopped as to the relators, holders in good faith for a valuable consideration, from setting up error and fraud to vitiate and repudiate the act. We are referred to various authorities as sustaining these positions.

We see no sufficient reason for ascribing to the instrument in question the character of commercial paper under the law merchant. True, it is payable to Isaacs or order, but this single feature of a negotiable instrument does not, we apprehend, clothe the third holders of this warrant with all the special rights and immunities which, on grounds of policy and in the interests of commerce, they would be entitled to under the commercial law as bona fide holders of a promissory note or a bill of exchange. The warrant simply authorizes the treasurer to pay Isaacs or order a certain sum for certain coupons of interest presented by him for payment. It is not of the nature of a bill of credit. It was not designed to circulate as a commercial security. It was obtained by imposition and fraud of a criminal character, commenced by the perpetration of an infamous crime. It was given in good faith towards the payment of a public debt. It proved to be utterly without consideration. It was essentially null and void when in the possession of Isaacs. It fell to ashes in his hands. Could it become anything better in the hands of a subsequent holder? Could Isaacs give it life and force by transferring it? Considerations of the public welfare and of public order seem to answer these questions in the

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negative. The strongest case cited by the council of the relators, and the one most relied upon by them as authority on the subject of estoppel, is that of *Moran v. Miama County*, found in 2 Black's Reports, p. 723.

In that case the question was whether the county was liable upon coupons which it was alleged in defense, the county had no right to issue. We agree that the county after receiving the money for its bonds was very justly estopped from setting up its want of right to issue the bonds or the coupons when called upon to pay them. But what did the State of Louisiana receive for the warrant issued to Isaacs? Was it the supposed credit for \$12,120 it expected to have on its public debt for coupons? Certainly not. The State was not benefited one cent by issuing the warrant. There is then no analogy between the two cases. Is the State powerless to protect itself from so shameless a fraud? Because through imposition successfully practised upon the Auditor, he stated that the State owed the amount expressed by the warrant, shall it be estopped from declaring and proving the fraud, and from alleging that on that account it does not owe the sum claimed.

On the other hand, the alleged equitable claims of the relators do not appear on examination to be as strong as represented. It is part of the history of the period during which they acquired this warrant, and it was a matter of public notoriety that extensive frauds had been committed upon the fiscal department of the State government, and that the predecessor of the present incumbent of the Auditor's office was complicated with those frauds.

A state of things existed which was well calculated to render dealers in securities of that kind cautious. It was a matter of no surprise during this state of uncertainty and doubt, when it was ascertained that large quantities of spurious coupons had been manufactured, and that the fraudulent act by which the warrant was obtained had been accomplished. The testimony of Levy, a broker of the city, is significant in regard to the suspicion that arose in his mind with respect to this warrant, while it was in the hands of Isaacs. Levy undertook to sell the warrant for Isaacs, but afterwards declined having anything to do with it, because as he states, "the manner of the man and his anxiety to sell the warrant below the market rate awakened my suspicions." Very soon afterwards one of the relators, Kelshaw, bought the warrant. In his testimony he said on cross-examination: "I have not been in the habit before purchasing warrants of going to Mr. Graham in order to inquire into the validity of warrants. Mr. Smith, the senior of the firm, did. I have done so since I bought this warrant about four points below the market prices."

Under all the circumstances and the surroundings of the transaction

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by which the relators became the owners of the warrant, we can scarcely think they exercised the degree of circumspection and care that ought to be expected from prudent men.

There are four bills of exceptions in the record. Three of them relate to evidence introduced by the defendant to establish the spurious character of the interest coupons. As these instruments were subsequently admitted to be forgeries, it becomes unnecessary to examine the bills of exception taken on the admission of the evidence. The other bill of exceptions is to the admission of the testimony of Levy as to what passed between him and Isaacs in regard to the warrant. The relators objecting that this was *res inter alios*. The objection was properly overruled. The evidence went to show that the warrant was hawked about for sale under suspicious circumstances, a fact which the defendant had, under the pleadings, a right to show.

We conclude that the relators should not be allowed to recover.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the rule taken by relators be dismissed at their costs in both courts.

HOWE, J., *concurring*. I concur, on the grounds that, *first*, there were no funds in the treasury at the time of the demand made by relators, and therefore no right in them to the summary remedy of mandamus; and *second*, that, under the circumstances of this case to allow the mandamus to issue would be practically to permit a citizen to sue the State, without her permission, upon a disputed claim

Rehearing refused.

No. 3232.—WM. WHITE, Administrator, JOSEPH J. DAIGLE, and H. B. WHITE, for use, v. THOMPSON W. BIRD.

All privileges in favor of merchants for supplies furnished to a planter, to have effect against third persons, must be recorded in the book of mortgages and privileges in the mortgage office of the parish where the property to be affected is situated. Constitution, art. 123.

APPEAL from the Fifth District Court, parish of West Baton Rouge. Posey, J. Barrow & Pope and White & Robertson, for plaintiffs and appellees. Samuel P. Greves and A. S. Herron, for third opponent, appellant.

LUDELING, C. J. The sugar and molasses made on the plantation of Bird having been seized, Arthur Thebout, a commission merchant, filed a third opposition, alleging that his claim for supplies furnished for the use of the plantation was a privileged debt.

There are several objections urged by the seizing creditors against the pretensions of the third opponent, but we deem it necessary to notice only one, to wit: That the opponent's account not having been

White, Administrator, Daigle, and White, for use, v. Bird.

recorded in the book of mortgages and privileges, he had no privilege which could affect third parties. Article 123 of the Constitution declares, among other things, that "no mortgage or privilege shall hereafter affect third parties unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first of January, 1870, unless duly recorded. The General Assembly shall provide by law for the registration of all mortgages and privileges."

In 1869 the General Assembly passed a law directing how mortgages and privileges should be recorded. Article 2093 Revised Statutes.

The provision of the Constitution is unambiguous—"no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated."

The account of the third opponent has not been recorded. He can not, therefore, assert any privilege so as to affect the rights of the seizing creditors.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

NO. 3293.—STATE OF LOUISIANA v. SOUTHERN BANK.

Banks organized under the free banking law of the State of Louisiana are exempt by said act from paying to the State or any of its municipal corporations. A license for carrying on the business of banking. The acceptance of the privileges of this law by any individual or company in the State amounts to a contract between such person or company and the State, which can not afterward be infringed or impaired by the State.

Article seventeen of section three of the revenue law of 1869, which imposes a license on persons engaged in banking under the free banking law of the State, is in conflict with section ten of article one of the Constitution of the United States, and is, therefore, void.

APPPEAL from Third District Court, parish of Orleans. *Emerson, J. S. Belden*, Attorney General, and *Hornor & Benedict*, for the State. *C. Roselius* and *Alfred Phillips*, for defendant and appellant.

LEDELING, C. J. This suit is to compel the defendant to pay one thousand dollars as a license for the year 1870, for the privilege of banking.

The bank avers that by its charter and the law authorizing free banks to be established (which forms a part of the charter), free banks are exempted from paying a license for carrying on their business.

There was judgment in favor of the plaintiff, and the defendant has appealed.

It is admitted by the Attorney General that this question was decided in the case of *New Orleans v. Southern Bank*, 11 An. 42, but he insists, in the brief filed, that we should overrule it. In that case the court said: "We must, therefore, conclude that this section was intended

23	271
44	070

for the security of the capitalist and an assurance to him that, if he invested his money in the banks, under this general banking law, his stock should be taxed at the same rate as other personal property. So far, then, this section possesses the force of an obligation, binding alike upon the State and all municipal and other corporations deriving their authority from this State.

We are unable to concur with those who contend that this opinion is erroneous.

To induce capitalists to invest their funds in institutions which would meet the public wants, the Legislature proffered that they might do so, upon certain terms and conditions and under the liabilities and penalties stipulated. The proposition was accepted. It is, therefore, a contract, binding upon the State as well as the bank.

"A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party."

In *Fletcher v. Peck*, 6 Cranch 135, Chief Justice Marshall said: "If an act be done under a law, a succeeding Legislature can not undo it."

Article seventeen of section three of the revenue act of 1869, which imposes a license tax upon the occupation of defendant, is violative of section ten of article one of the Constitution of the United States.

It is therefore ordered and adjudged that the judgment of the court *a qua* be avoided and reversed, and that there be judgment rejecting the plaintiff's demand, with costs of both courts.

23	272
47	780
23	272
111	756

No. 2610.—JOSEPH H. BALCH v. ANN YOUNG, Widow and Tutrix.

The law does not require that the acceptance of a contract must be expressed on its face, nor is it essential that the act be signed by the party in whose favor it is made. The acceptance may result from his acts in availing himself of its stipulations or in doing some act which indicates his acceptance.

APPEAL from the Fifth District Court, parish of Iberville. *Posey, J. Talbot & Petit*, for plaintiff and appellee. *Barrow & Pope*, for defendant and appellant.

LUDELING, C. J. The plaintiff sues to annul a sale of rights and credits, on the grounds that he was intoxicated when he made the sale, and that Young, the vendee, never accepted the sale.

There is no evidence in the record to prove the first ground. The acceptance of a contract need not be expressed in it, nor is it indispensable that the act be signed by the party in whose favor it is made. The acceptance may result from his acts in availing himself of its stipulations, or in doing something which clearly indicates his accept-

Balch v. Ann Young, Widow and Tutrix

ance. In this case Young had the act of sale prepared by a lawyer; it was signed and recorded by the plaintiff, who was the recorder, and then delivered to Young, who placed it among his papers, where it was found after his death. 13 La. 267, *Amory v. Black*; 4 An. 162; 3 An. 523, *Ryder v. Frost*; C. C. 1811.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment in favor of the defendant, rejecting the plaintiff's demand, with costs of both courts.

No. 3160.—*DESIRE SOMPAYRAC, Wife of A. LECOMTE, and Executrix, v. Succession of E. L. HYAMS.—PAULINE FLAUNER, Third Party.*

In this case a mortgage creditor, represented by his executor, obtained an order of seizure and sale of the property mortgaged. Another mortgage creditor took a devolutive appeal from the order of seizure, on the ground that there was no authentic evidence of the appointment as executor, that the executor was not authorized under the will to dispose of the property, and that the sum for which the order was issued included compound interest. Held—That if these facts were admitted the third party, a mortgage creditor, would not be injured, because if he held a superior mortgage he would be entitled to the proceeds of the sale in full satisfaction thereof; that if his mortgage was inferior in rank he would be entitled to the residue after paying the older mortgages; that not being injured by the sale of the property mortgaged he could not, therefore, as a third party, obtain an appeal from the order of seizure and sale.

APPEAL from the Ninth District Court, parish of Natchitoches. *H. C. Myers*, Parish Judge, in place of the District Judge, absent. *William M. Levy*, for plaintiff and appellee. *H. Safford*, for third party, appellant.

LUDELING, C. J. In November, 1869, *Desiré Sompayrac* obtained an order of seizure and sale against a plantation belonging to the succession of *E. L. Hyams*, situated in the parish of Natchitoches. From this order *Pauline Flauner*, a third party, alleging that she was a mortgage creditor of the property seized, and that she was injured by the order of seizure and sale, took a devolutive appeal from the order of seizure and sale.

We are unable to discover how the appellant could be injured by the order of seizure and sale, even if the allegations made in her counsel's brief be admitted, that there is no authentic proof of the appointment of the executor, or that he had authority under the will to dispose of the property, and that the sum for which the order issued includes compound interest.

The appellant is not a party to the order of seizure and sale. If her mortgage be first in rank, the sale could not affect her rights; and if her mortgage be not superior to plaintiff's, she could claim the surplus of the proceeds of the sale, over the amount legally due on the mortgage.

It is therefore ordered that the appeal be dismissed at the cost of the appellant.

 Barriere & Co. v. Widow Mathilde Fortier.

No. 2246.—F. G. BARRIERE & Co. v. Widow MATHILDE FORTIER.

An agent's authority to sign a promissory note for his principal must be express and special, and on the trial of the case under the general issue the burden of showing the agent's authority to sign the note falls on the holder.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. A. L. Tissot*, for plaintiffs and appellees. *Trist & Oliver*, for defendant and appellant.

TALIAFERRO, J. The defendant is sued on a promissory note for \$592 10, which purports to be signed by an agent acting for the defendant. The defendant pleads the general issue. Judgment was rendered in the court below for the plaintiffs, and the defendant appealed. There is no evidence in the record showing that the person who signed the note was authorized by the defendant to do the act. Under the pleadings it was incumbent upon the plaintiff to make this proof.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that judgment be rendered in favor of the defendant as of nonsuit, the plaintiffs paying costs in both courts.

No. 3231.—THOMAS H. PATTERSON v. HIRAM LITTON.

If the possession of the defendant to real estate is of date anterior to the title under which the plaintiff claims, then and in that case the plaintiff can not recover unless he show a perfect title. 15 An. 454.

Prior to the act of 1847, the parish judge or his clerk could alone make a valid sale of succession property. C. C. 2600. Therefore a sale made of succession property prior to that date, by an auctioneer, conveyed no title whatever.

APPEAL from the Ninth District Court, parish of Sabine. *Orsborne, J. E. C. Davidson and J. F. Smith and Pierson & Levy*, for plaintiff and appellant. *C. C. Chapman & Son*, for defendant and appellee.

LUDELING, C. J. The plaintiff alleges that he is the owner of a tract of land, described in the petition as a Rio Hondo claim, No. 114; that he acquired the same from S. D. Bossier, who derived title at a probate sale of the succession of John Litton, the grantee, and defendant's father.

The evidence shows that the defendant took possession of the land in 1837, as an heir of the grantee, John Litton; that he has been in possession ever since that period, and that the plaintiff purchased from S. D. Bossier, on the second June, 1858. The plaintiff must show a perfect title, therefore, to recover.

We think he has failed to do this. Previous to the act of 1847, the parish judge or his clerk alone could make a valid sale of succession property. C. C. 2600. In this case the succession sale was made by an auctioneer.

Patterson v. Litton.

The adjudication appears never to have been completed. The sale was made on a credit, and S. D. Bossier, who bid \$250 for the property, failed and refused to comply with his bid. This fact is stated in the account of the curator of the estate, who was the father of S. D. Bossier. And the *proces verbal* of the sale made by the auctioneer was never recorded by the judge, nor was any deed ever made to the purchaser. Bossier, therefore, had no title, and he could convey none to his vendee. C. C. 2427.

The evidence shows that the plaintiff was informed before he bought from Bossier that he had never complied with his bid.

Even if the defendant could be regarded as a naked possessor, the plaintiff would fail, for he has not established a title anterior in date to the possession of the defendant. 8 La. 246, *Bedford v. Urquhart*; 15 An. 454, *Young v. Chamberlin*.

It is therefore ordered that the judgment be reversed, and that there be judgment rejecting plaintiff's demand, with costs of both courts.

No. 3234.—CHARLES K. BYRNE v. THE CITIZENS' BANK.

If a mortgage is not reinscribed within ten years, its rank becomes postponed to those mortgages which were placed of record subsequent thereto, but which were not perempted at the time of the reinscription. Therefore, if the property mortgaged be sold under the mortgage which has lost its rank for want of reinscription within ten years it can only be sold subject to the mortgages having priority of rank. This priority of rank is to be determined by the date of registry, allowing to a mortgage which has perempted before reinscription to date only from the date of registry of the reinscription.

A PPEAL from the Thirteenth Judicial District, parish of Madison.
Hough, J. W. W. King, for plaintiff and appellant. *Farrar & Aroni*, for defendant and appellee.

TALIAFERRO, J. The Citizens' Bank having a mortgage on a tract of land lying in the parish of Madison proceeded *via executiva* to enforce it. An injunction was obtained by the plaintiff to prevent the sale on the ground that he is the owner of the land, having, as he alleges, purchased it at sheriff's sale, holding under the deed of the sheriff, dated third of October, 1868. He shows a judgment, a sale under execution issued upon it, and a sheriff's deed. He shows also that he took out subsequently a monition and that the same was duly homologated by judgment of a competent court, after due notice and proceedings had in conformity with law. A motion to dissolve was filed by the defendant, but the grounds therein taken will come under consideration on the examination of the merits and we omit a notice of them here. The defendant, in answer, avers that the sale under which plaintiff sets up title was gotten up in fraud of the rights of creditors and is null; that the Citizens' Bank holds the first mortgage on the property and that it could only have been sold legally, subject

to that mortgage; that the judgment under which the pretended sale was effected was predicated upon an obligation which was prescribed and a mortgage which had become extinct. The defendant expressly charges fraud and prays a dissolution of the injunction, with five hundred dollars damages and costs.

The judgment in the court below was in favor of the defendant. The injunction was dissolved with two hundred dollars damages decreed against the plaintiff and his surety on the injunction bond.

The plaintiff has appealed.

Daniel Byrne, father of the plaintiff, on the seventeenth day of April, 1856, executed in favor of Catesby Barnes four several promissory notes, each for the sum of two thousand dollars, the last one of the series maturing on the first of January, 1860. To secure the payment of these notes he gave a mortgage on the land in controversy, which was recorded on the same day the notes were executed, seventeenth of April, 1856. This mortgage was reinscribed on the twenty-ninth of June, 1868. On the twenty-seventh of February, 1866, in settlement and liquidation of a large indebtedness to Gordon & Castillo, of New Orleans, Daniel Byrne executed a mortgage upon the same land to secure to them or to any future holders thereof fifty-six promissory notes drawn by him, payable to his own order and indorsed by him, dated first of June, 1865. This mortgage was recorded in the parish of Madison on the sixth of March, 1866. On the eleventh of January, 1866, Daniel Byrne waived prescription on the last note of the series given by him on the seventeenth of April, 1856, to Catesby Barnes, and which, as we have seen, fell due on the first of January, 1860. Suit was brought upon that note by Barnes on the twenty-seventh of October, 1867, and it appears that Daniel Byrne, on the same day, waived citation, accepted service and confessed judgment. The petition in this case recites the mortgage given to secure the payment of the notes of the seventeenth of April, 1856, and prays that it be enforced against the property mortgaged. The judgment rendered in the case recognized the mortgage and directed the land mortgaged to be seized and sold. After the usual proceedings the sale was made on the third of October, 1868, and Charles K. Byrne, the plaintiff in this case, became the purchaser. The certificate of mortgages read at the sale recited as the first the mortgage of Daniel Byrne to Catesby Barnes, giving the date at which it was recorded, seventeenth of April, 1856, and the date of its reinscription, twenty-ninth of June, 1868. The mortgage in favor of the Citizens' Bank is placed as second in order on the list of mortgages recited. This mortgage contains the *pact de non alienando*. It is shown by the evidence that Daniel Byrne, the father, has continued to reside on the land sold since the sale, and that Charles K. Byrne has possession and control of the premises.

Byrne v. Citizens' Bank.

We think there is no error in the judgment. The certificate of mortgages read at the sale of the property was clear and distinct as to the dates at which the two mortgages were recorded. It showed that the mortgage to Barnes had perempted and that its reinscription postponed it to the mortgage of the Citizens' Bank, which, being first in rank, the property sold under the junior mortgage could only be sold subject to that of the Citizens' Bank.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 3191.—Mrs. C. CAULK v. Mrs. C. PICOU and Husband.

The law provides that whenever, owing to the mismanagement of the husband, the dowry of the wife is in danger, or when the disorder of his affairs induces the wife to believe that his estate may not be sufficient to meet her rights and claims, she may petition the court for a separation of property. Civil Code, 2425. In such a case, the judge must hear evidence to show that the belief of the wife that her rights are in danger has a rational basis, before he grants the order, but no particular kind or quality of evidence is required. Evidence that the husband is possessed of a large estate, sufficient in amount to cover the wife's claims, if it be shown on the other hand that he has met with heavy losses, and is indorser, etc., for large amounts, will not justify the court in rescinding or annulling an order which has been granted separating them in property.

A PPEAL from the Fifth District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellant. *Andrew S. Herron*, for defendants and appellees.

HOWELL, J. On the third of August, 1865, Mrs. Carmelite Picou, the defendant, obtained a judgment against her husband, Isaac Irwin, for the separation of property, the possession of her paraphernal effects, and the sum of \$48,327, with a privilege on the movables and mortgage on all the immovables of the husband to the extent of \$10,000 as dotal funds, and a mortgage for the balance as paraphernal from the following dates: For \$26,612 from first June, 1858; for \$5000 from seventeenth October, 1857; for \$400 from first May, 1832; for \$500 from twenty-sixth March, 1836; for \$615 from twentieth June, 1839; for \$2300 from eighteenth May, 1853; for \$700 from tenth January, 1854; for \$1100 from twenty-second February, 1855; for \$1100 from twenty-seventh July, 1856.

Under this judgment the wife was put in possession of certain movable and immovable property, and the landed estate was sold at sheriff's sale, and bought by her, on seventh October, 1865, at the price of \$13,500, a little above the appraisement.

On twelfth August, 1867, the plaintiff, Mrs. Caulk, obtained judgment against Isaac Irwin for \$6676 36, with eight per cent. interest and mortgage from seventeenth February, 1859, subject to certain credits on March 1, 1860, and February 14, 1861.

Mrs. Caulk v. Mrs. Picon and Husband.

The present suit was brought by said Mrs. Caulk in April, 1868, to annul the above judgment in favor of, and sheriff sale to Mrs. Picon, wife of Irwin, on the ground that they were fraudulent and collusive, the judgment having been rendered on the confessions and receipts of the husband, and not upon evidence binding on creditors, the husband not having been shown to be embarrassed at the time, and the separation being voluntary, and hence the wife acquired no title to the property at the sheriff's sale.

The district judge rendered judgment against the demand for nullity, but reduced the amount in favor of the wife to \$31,016 57, with mortgage for different sums, respectively from twenty-second June, 1858, to fifteenth October, 1860, giving priority to \$13,073 74 over the plaintiff's mortgage, and sustained the validity of the separation and sale. From this judgment plaintiff has appealed.

The first point pressed on our consideration relates to the validity of the decree of separation. There is abundant evidence that Irwin was indebted in some amount to his wife, and the question arises as to the legal cause for a separation of property—the danger to the wife's rights. The law does not fix the degree or quality of proof, but simply provides that the wife may petition for it whenever her dowry is in danger, owing to the mismanagement of her husband or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims. C. C. 2425. The judge must have evidence that this belief has a rational basis, before granting her prayer. In the case of the defendant, she was claiming \$48,327 from her husband immediately after the war, when the pecuniary condition of most persons in the State was at least uncertain, and when, as was shown, her husband had lost many slaves; she besides showed that there were two mortgages on his real estate, amounting to ten thousand dollars, and he was indorser to the extent of \$40,000. She also introduced her marriage contract for a dowry of \$10,000, and the assessment of her husband's property in 1864 at \$48,300.

The plaintiff in this suit contends that this last fact is sufficient to annul the decree of separation, because it shows that the husband could not have been so embarrassed as to endanger the wife's rights. We are not prepared to concur in this position. We think the circumstances show that the wife had a reasonable ground to believe that her rights were in danger, and the appraisement and public sale of the same property in about two months after, at the sum of \$13,500, justified her belief and the conclusion of the judge as to the cause for a separation. It is true plaintiff alleges that this sale was far below the real value of the property at that time. The evidence, however, does not sustain this allegation, and there is no averment or proof that there

Mrs. Caulk v. Mrs. Picon and Husband.

were any devices or efforts to prevent a fair sale. Several witnesses, introduced on the trial of this case, show that the appraisement and sale were not far from the true value at the time. We, therefore, are not disposed to interfere with said decree. It is not a consent judgment or voluntary separation as urged, for the husband denied the alleged embarrassment, and there was proof introduced.

As to the amount allowed the wife in the judgment appealed from, and that to which priority is given over the plaintiff, we think the judge is fully sustained by the evidence and the ruling in *Eager v. Brown*, 14 An. 684, 7.

Judgment affirmed.

No. 3315.—STATE ex rel. J. M. KANE v. THE JUDGE OF THE SEVENTH DISTRICT COURT, Parish of Orleans.

23 279
p122 51

The judgment of the court below setting aside a suspensive appeal on the ground that the surety on the bond is not good and solvent, will be reviewed by the Supreme Court on an application for a writ of prohibition, and if the surety is found to be good, the writ of prohibition will issue. A surety on the appeal bond need not show that he possesses real estate to an amount sufficient to cover the bond, nor need he show that he will be worth the amount of the bond at the time it becomes exigible. It is sufficient for him to show that he is worth in personal property, over and above his liabilities, an amount above that of the bond at the time of signing it.

APPPLICATION for a Writ of Prohibition. *Bentinck ngan*, for relator. *T. Wharton Collens*, Judge, respondent.

HOWELL, J. The relator asks for a writ of prohibition to restrain the judge of the Seventh District Court for the parish of Orleans from proceeding any further in the case of *James M. Kane v. John Robinson*, from a judgment in which he had obtained a suspensive appeal.

The judge answers that he set aside the appeal as suspensive because the security on the bond was not good and solvent for even two hundred dollars, the amount thereof.

The testimony of said security is brought up and it shows that he is worth the amount of the bond over and above all his liabilities; that his property, all movable, is estimated by him at about six hundred dollars and is within this parish, where he resides, and that he does not owe more than twenty-five or thirty dollars, to pay which he has the money.

This seems to answer the requirements of the law. A surety is not required to own immovable property, but to have property sufficient, at the time of signing the bond, to answer for the amount of the obligation assumed by him. There is nothing in the record which leads us to suppose or conclude that his property, as described by him, is insufficient in value and amount to meet the obligation signed by him. The theory that the property may deteriorate or be disposed of

before the termination of the litigation would render most sureties doubtful, at least, if made the test of sufficiency. The law rather presumes that every man will endeavor to increase than lessen his possessions.

It is therefore ordered that the writ of prohibition herein be made perpetual.

No. 2202.—P. DUFORT. v. L. ABADIE.

Injuries done to one's feelings by slanderous words used toward him by another in public, such as "thief and rascal," furnish legitimate ground for an action in damages, and the amount of damages will be measured by the aggravated character of the language used. 17 An. 64; 19 An. 322.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Sambola & Ducros*, for plaintiff and appellee. *E. Cambray*, for defendant and appellant.

HOWELL, J. The plaintiff claims \$5000 damages for slanderous words uttered by the defendant, and the court *a qua* having allowed \$500, the defendant appealed.

His counsel avows that the object of the appeal is to obtain a reduction of the damages assessed, as excessive, and relies on the case of *Miller v. Roy*, 10 An. 231, to support his demand. In that case, \$5000 were claimed for having been called a thief, etc., as in this case; \$300 were allowed, and on appeal the judgment was affirmed. The court said: "There is evidence tending to show that the plaintiff's good repute suffered in some degree from the charges brought against him in such intemperate language by the defendant, and it is not pretended that the charges had any foundation in truth;" while in this case, counsel contends there is no evidence tending to show that the plaintiff's good repute suffered in any degree. As said in the case quoted: "Injuries to the feelings and to one's social standing are not susceptible of a precise admeasurement. Still, in a very limited class of cases, such injuries are recognized as a legitimate ground of action." We think the evidence in the record shows this to be one of that limited class of cases, and that the damages awarded by the district judge are not excessive. The defendant was emphatic in denouncing plaintiff, in his presence and before a crowd, as a "thief and rascal," and several times repeated the epithets, notwithstanding the remonstrance of plaintiff and a friend, and it is shown that the charges were the subject of frequent comment among plaintiff's acquaintances as calculated to have an injurious effect on his standing. The circumstances bring the case within the ruling in those of *Bonnin v. Elliott*, 19 An. 322, and *Mohrman v. Ohse*, 17 An. 64.

Judgment affirmed.

No. 3150.—H. KENDALL CARTER v. S. C. WILLIAMS, Administrator.

Defendant owed plaintiff \$8008. To secure this debt he sold to plaintiff three-fourths of his plantation, and gave him three notes, each for one-third of the debt, due at one, two and three years, with a stipulation in the agreement that if the debtor should promptly pay the notes at their maturity, the land was to revert to him again; but if he failed to pay the notes at maturity, then the right to recover back the plantation or the portion he had thus disposed of was forfeited. Held—That this transaction was a sale with the right of redemption, and not a mortgage given by the debtor to secure the debt.

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A PPEAL from the Ninth Judicial District, parish of Natchitoches. *Orsborne, J. Pierson & Levy*, for plaintiff and appellee. *Jack & Pierson*, for defendant and appellant.

TALIAFERRO, J. Freeborn G. Bartlett and the plaintiff, on the eighteenth of February, 1868, entered into a contract, the substance of which is as follows: Bartlett acknowledged to owe Carter \$8008, and declared, "that for the purpose of securing unto the said Carter the said sum of money, I do hereby sell the undivided three-fourths part of my plantation," etc., describing the premises, and adds, "which sale I hereby make for and in consideration of said indebtedness to said Carter. In evidence of which indebtedness I this day furnish three promissory notes, each for \$2669 43, dated this day and payable in one, two and three years after date, with eight per cent. per annum interest from maturity. Said notes are made payable to said Carter, and are not negotiable, and are also subject to all the stipulations contained in this act." The act then recites: "It is hereby agreed by and between the parties that in case the said Bartlett shall well and truly pay unto said Carter the said notes, according to their tenor, then he shall be entitled to the redemption of the property which he does hereby convey, and by absolute right, by reason of the payment of the notes."

It is then agreed that if the first note is not paid at its maturity, the right of redemption ceases if Carter so elects, and he takes the property as absolute owner. If, however, he should not so determine, the payment of the first note is thereby postponed to the maturity of the second note, when he has the same option; but in this case Bartlett has priority of choice, for it is one of the express stipulations that he also has the right at the end of the second year to terminate the right of redemption, and render Carter perfect owner of the property, "in case he should find at the end of two years that he can not pay said notes." It is clearly expressed that a failure to pay the notes was to operate a loss of the right of redemption, Carter taking in full ownership the property and restoring the notes to the maker of them, whose indebtedness became extinct. In the event the right of redemption should lapse by neither party taking action in regard to it, an amicable partition in kind was to take place between the parties. During the term agreed upon for the payment of the debt, Bartlett was to remain

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upon the plantation and use the stock, working animals, etc., without the payment of rent or anything for the privilege, and the crops grown on the place to be exclusively his own property and to inure to his benefit alone. They were, however, to be shipped to Carter, as a commission merchant, and sold by him. The taxes and other charges on the plantation to be paid by Bartlett.

In the month of July following, about five months after this contract was entered into, Bartlett died. The present defendant, Williams, became his administrator. An inventory was made, and the land, plantation, stock, etc., were entered upon it as belonging in undivided ownership to Bartlett and Carter, an undivided fourth part only of the entire property being treated as belonging to the succession of Bartlett. On the seventh of May, 1869, the administrator filed a provisional account of his administration and a schedule of the debts of the estate, but the notes held by Carter for the \$8008 owing to him under the contract referred to were not mentioned among the debts. An opposition was filed on the part of Carter to the administrator's account. It is alleged in this opposition that Carter is a creditor of the succession in the sum of \$8003, evidenced by the three notes we have already described, which, it is alleged, are secured by mortgage by the act of eighteenth February, 1868, the one just recited.

These proceedings were first instituted in the parish court of Natchitoches, and a judgment was rendered in that court rejecting the opponent's claim. An appeal was taken to this court at the term at Natchitoches for August, 1869, and dismissed for want of jurisdiction in the parish court. The controversy was subsequently renewed in the district court, where it was concluded in January, 1871, by the rendition of a judgment in favor of the plaintiff and opponent, recognizing the act of eighteenth February, 1868, as a mortgage to secure the payment of the notes therein specified, and ordering their payment in due course of administration. From this judgment of the district court the administrator has appealed.

The character of the instrument forming the basis of this litigation, and the intention of the parties in executing it, are the principal inquiries in this case. A mortgage is a secondary obligation entered into to secure the performance of a principal or primary obligation. Is the act under consideration a secondary obligation? If secondary, what is the principal obligation? Can the notes be so considered? They are not negotiable, and were expressly made so. They are, moreover, expressly subordinated to the stipulations of the written act. The language of the written agreement is: "Said notes being payable to said Carter and are not negotiable, and are also subject to all the stipulations contained in this act." It is not declared that the property mentioned is mortgaged to secure the payment of these notes.

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On the contrary, the act in the outset recites, that "for the purpose of securing unto the said Henry Kendall Carter the said sum of money, the said Freeborn G. Bartlett does hereby sell the undivided three-fourths part of his plantation, containing six hundred acres," etc. After a description of the land and appurtenances sold, the act continues: "It is hereby agreed by and between the parties that in case the said Bartlett shall well and truly pay unto the said Carter the said notes according to their tenor, then he shall be entitled to the redemption of the property which he does hereby convey, and by absolute right, by reason of the payment of the notes." That is, he is to get back the land if he pays the notes. It is not stipulated that if the notes are not paid the creditor shall have the right to sell the land by judicial process, and apply the proceeds to the payment of the notes in the manner of proceeding to enforce a mortgage. No such proceeding is contemplated. The creditor is already the owner of the property, and if the notes are not paid they are to be returned to the maker, and the debtor loses the right of getting back the property. This discharge from his indebtedness is the consideration for which he sells three-fourths of his plantation. The contract is so far complete that the creditor can not pursue the debtor on the notes. The notes in this transaction represent no indebtedness of Bartlett to Carter. They are mere memoranda indicating sums of money, which, if paid according to their tenor, the creditor is willing to receive in lieu of the property he has already taken in payment of his debt, and which he is bound to permit the debtor, by paying these sums, to redeem. They are not subsisting obligations upon which the creditor can found an action. We conclude, therefore, that the notes do not constitute the primary obligation. If this be true the act is not a mortgage. That it is a sale with right of redemption we think there can be no doubt. It has all the elements of a contract of that kind. The property is declared to be sold; the price is the \$8008 which the debtor owed. A term is stipulated within which he may redeem the property on paying certain sums of money in annual installments. A failure on the part of the seller to pay the first installment enables the buyer, if he thinks proper, to preclude the seller's right to redeem. If the buyer fails to give notice of his refusal to extend the term, it becomes thereby extended for another year. At the end of the second year both parties are empowered to declare the right of redemption at an end, and either may so declare. The party having the right of redemption expressly stipulates for himself the right to declare and elect that the said Carter is the absolute owner of the said property, now transferred to him in full release and extinguishment of said indebtedness of said Bartlett, "in case said Bartlett should find at the end of two years that he can not pay said notes."

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It is argued that the act is a mortgage having the faculty of becoming a sale, if at the end of two years from the date of the act Bartlett should be unable to pay the notes, and should elect to declare Carter to be the owner of the property in lieu of the debt; and that Bartlett having died before the expiration of that time, and Carter not having declared the forfeiture of the right to redeem, no formal and final action has been taken in the matter. And it is, therefore, further held that the act is still a mortgage, and should be so enforced, as decreed by the district court.

We do not see the force of this reasoning. It is shown that the administrator has throughout disclaimed all right of the succession of Bartlett to three-fourths of the property in question, and that he has constantly resisted the claim set up by the plaintiff upon the notes. There is, therefore, now no remaining right of redemption or will to exercise that right if it remained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the opposition to the administrator's account by the plaintiff be overruled and dismissed; that the notes upon which the opposition is founded be canceled and annulled, and that the administrator's account, so far as relates to the opposition of the plaintiff, be approved and homologated, the plaintiff paying costs in both courts.

Rehearing refused.

No. 3221.—LUCY G. BEARD and Husband v. J. V. DURALDE, Jr.,
Sheriff, et al.

Materials that are for the first time collected together for the purpose of erecting a building do not form a part of the realty, nor do materials that result from the demolition of a building any longer retain their character of immovables and form a part of realty; but where a building is torn down with the view and intention of remodeling and repairing, and in doing which the same materials are to be used, then and in such case, the character of immovables which the materials have acquired by being used in the construction of the first building is not lost, and they are still immovables by destination, because they are intended to be used in the repairing or reconstructing the old building.

A PPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Posey, J. Samuel P. Greves*, for plaintiffs and appellees. *Barrow & Pope*, for defendants and appellants.

TALIAFERRO, J. Archinard, administrator of the succession of Giquel, having obtained a judgment against Mrs. Beard, issued an execution and seized a lot of lumber and bricks on her plantation. She enjoined the sale on the ground that the articles were being put to the use for which they were intended, that is in the erection of a framed sugarhouse, at the time they were seized by the sheriff, and were immovables by destination, and could not be seized separately from the land on which the building was in progress of construction.

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This ground was considered by the judge *a quo* as sufficient to warrant the plaintiff in staying the execution by injunction, and rendered judgment perpetuating it. The defendant appealed.

Article 468 of the Civil Code is relied upon to support the position assumed by the plaintiff. That article reads thus: "Materials arising from the demolition of a building, those which are collected for the purpose of raising a new building are movables until they have been made use of in raising a new building. But if the materials have been separated from the house or other edifice only for the purpose of having it repaired or added to, and with the intention of replacing them, they preserve the nature of immovables, and are considered as such."

The evidence is that a portion of the bricks had been used in building the foundation for the sugarhouse; that about half the foundation had been laid; that the workmen were putting up the building at the time the bricks and lumber were seized. But, as appears from the evidence, the sheriff seized only the bricks and lumber that were lying around convenient to be used as the work progressed, and not any of the material which was already worked into or attached to the new structure. A part of the lumber seized was still lying at the landing where it had been delivered, having been brought there by water, as had also the bricks.

We do not see the parity of reasoning by which it is maintained on the part of the plaintiff that building material intended to be used in the construction of an edifice, although never having been so used, becomes immovable by its distinctive quality like materials are which, having formed part of a house, have been separated from it only for the purpose of having it repaired or added to, and with the intention of replacing the materials. In the latter case, the materials had acquired their character of immovables by having previously constituted part of the fabric, and they retain that character where the intention exists of replacing them in repairing or enlarging the edifice. In the former case, the materials have not that character because they have never constituted a part of any structure or work of any kind to give them that character.

We think the court below erred in the conclusions it aimed at in supposing the facts of this case analogous to one in which materials are detached from a building with the intention of using them in repairing or enlarging that building. The first paragraph of article 468, already quoted, seems explicit on the subject. Two classes of materials are enumerated in that paragraph, and both classes are declared to be movables: First, materials arising from the demolition of a building. This is where the building or work is destroyed. Its component parts are permanently separated, and they lose their character of immovables because the destination which was imparted to

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them and which gave them the character of immovables is at an end. Second, materials which are collected for the purpose of raising a new building are movables until they have been used in raising a new building—the very case presented here. We see from the second paragraph that it treats of materials having a different condition from that of those spoken of in the first paragraph. The materials in this category are not those of a demolished building, nor such as are collected for the purpose of raising a new building. They are such as have been separated from a building temporarily, and to be again attached to it, in the operation of repairing or enlarging it. The cases in 2 An. 451, 4 An. 127, and 6 Rob. 424, harmonize with the views here taken.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the injunction be dissolved, and that the defendant in injunction recover of the plaintiffs and their sureties, *in solido*, eight per cent. interest per annum on the amount of the judgment enjoined, ten per cent. thereon general damages, and seventy-five dollars as special damages, and all costs of suit.

Rehearing refused.

No. 2816.—J. FOLEY v. MARY F. HAGAN

A privilege given by private contract confers no preference over a mortgage on the same property, if it is not recorded in the parish where the property is situated on the same day on which the act or other evidence of the debt was made. C. C. 1870, 3274.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. McGloin & Kleinpeter*, for plaintiff and appellant. *Rousseau & Estevan*, for defendant and appellee.

HOWELL, J. The plaintiff claims a privilege for making and repairing a levee on the plantation of the defendant which was seized and sold under a mortgage in the suit of *G. W. Murrell v. Mrs. Hagan*, and the amount claimed was ordered to be retained by the sheriff. The privilege was denied, and the plaintiff appealed.

He neither alleged nor proved that the work was adjudicated to him in accordance with existing laws and ordinances, but relies upon the registry of a private written agreement or contract with the proprietor. This registry, however, was not made in compliance with article 3240, C. C. of 1825, and by article 3241 the privilege was lost, admitting that a privilege could so be acquired, under existing laws, to the prejudice of Murrell's mortgage created in 1860.

This view of the case renders it unnecessary to pass on the bill of exceptions and other points referred to in plaintiff's brief.

Judgment affirmed.

Rehearing refused.

Loose v. De Lacey, Sheriff—Beatty, Intervenor.

No. 3173.—HARVEY S. LOSEE v. JOHN DE LACEY, Sheriff—WILLIAM J. BEATTY, Intervenor.

A judgment creditor who has caused the seizure of a plantation can not be required to release his seizure because an injunction has been granted against the sale of one undivided half of the place. In such a case he may cause the other undivided half, not enjoined, to be sold, and if the sale is to be made with benefit of appraisement, the one-half of the estimated value of the entire property is the proper basis on which the sale should be made. If the sale be made in this way the sheriff, on refusal, will be compelled by mandamus to make formal title to the one undivided half thus sold and put the purchaser in possession thereof.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborne, J. Wm. A. Seay*, for plaintiff and appellant. *J. G. White*, for defendant and appellee. *T. O. Manning*, for intervenor, appellee.

WYLY, J. The plaintiff alleges, that at sheriff's sale, under three writs of *fiery facias* against the defendant in execution, William J. Beatty, he became the purchaser of an undivided half of a tract of land belonging to the latter for the sum of \$3666 66, an amount exceeding two-thirds of the appraised value thereof; that being the highest and last bidder, the property was adjudicated to him. He also avers that the sheriff refuses to make him a title to said property, although he duly tendered the price of the adjudication, and is ready, and always has been, to pay the money to him. On these averments he prayed for a rule on the sheriff, and at the trial thereof that he be ordered to make him a title to said property and put him in possession on paying the amount of his said bid, etc.

William J. Beatty, the defendant in execution, intervened and complained that his property had been adjudicated without a full observance of legal formalities; that the whole of his plantation, containing one thousand acres, was seized, advertised and appraised, notwithstanding which the sheriff offered for sale an undivided half thereof, and the plaintiff having bid "two-thirds of the one-half of the appraisement, claims to have title made to him;" that if the sheriff offered and adjudicated the undivided half of the plantation seized and advertised, he did an unlawful act, and discovering the illegality, he rightly refused to make title to the adjudicatee.

The prayer of the intervenor is, that the demand of the plaintiff be dismissed; that the sheriff be sustained in refusing to make title, and that the pretended sale be declared a nullity.

In answer to the rule of the plaintiff the sheriff states, that under the writs in his hands he seized the whole of the plantation and advertised it as an entirety for sale; but subsequent to these proceedings, to wit: on the fifth of November, 1869, and a few hours before the sale, "he was enjoined from making the sale of the plantation according to the seizure and advertisement and appraisement then

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already made, by virtue of a writ of injunction from and by this honorable court in the suit of L. A. Sauton, tutor, v. William E. Leverich and John De Lacey, sheriff, No. 1548 on the docket; that by this writ of injunction the sale of the undivided one-half of the plantation thus seized and to be offered for sale was inhibited; that your respondent, without reflection and ignorant of the legal consequences of this writ of injunction as affecting the said seizure and sale, and taking the appraisement of the whole plantation, which had been previously made as above stated, as the basis for the appraised value of the one undivided half thereof not enjoined as aforesaid, he did at the time and the place set forth in the advertisement above referred to, offer for sale under the seizure, the advertisement and the appraisement, the undivided one-half of the plantation, when the plaintiff herein appeared and made the last and highest bid, which bid exceeded two-thirds of the one-half of the appraised value of the property or the whole plantation; that immediately after these steps were taken your respondent was notified by parties in interest that the sale of the undivided one-half of this plantation could not be legally and rightfully made; that he could not legally sell the half when he had seized, appraised and advertised the whole, without commencing his proceedings anew;" that his refusal to comply with the plaintiff's demand, as set forth in the rule, was because he believed the sale was illegal and he did not wish to commit a wrong knowingly.

The court gave judgment rejecting the demand of the plaintiff, annulling the sale and sustaining the sheriff in refusing to make title to the adjudicatee.

The plaintiff has appealed.

We find in the record a copy of the appraisement, dated on the sixth of November, 1869, instead of on the fifth of the same month, as stated by the sheriff. This instrument shows that the defendant in execution, the intervenor in this proceeding, appointed one of the appraisers, and that the whole plantation, with its improvements, was appraised at "eleven thousand dollars (\$11,000), one undivided half being five thousand five hundred dollars."

From the evidence we regard the appraisement as substantially correct.

The only question is, can the sheriff who has seized and advertised the whole of a plantation, after being enjoined from selling one undivided half, proceed to the sale of the other undivided half without making a new seizure and advertisement? We think that he can. We know of no law compelling a seizing creditor to release his seizure because part of the property seized by the sheriff has been enjoined and can not be sold pending the injunction. Besides, in this proceeding, neither the sheriff nor the intervenor has alleged and proved

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an injury ; nor has it been shown that the property was adjudicated to the plaintiff for less than two-thirds of its appraised value or for less than its real value.

The authorities cited by the intervenor and the sheriff are not in point, and the judgment of the court below is manifestly erroneous.

It is therefore ordered that the judgment of the court *a qua* be avoided and annulled ; and it is now ordered that there be judgment for the plaintiff, making his rule absolute and requiring the sheriff to make to him a formal transfer of the property adjudicated to him and put him in possession thereof, on his paying the price of adjudication ; and that the sheriff pay costs of this proceeding. It is further ordered that the intervention herein be dismissed and that there be judgment against the intervenor for the costs of the intervention ; and that appellees pay costs of this appeal.

Rehearing refused.

No. 3186.—JAMES J. POWELL v. CATHERINE S. DANIEL.

A contract to remove slaves and other property to Texas and take care of them, during the late war and before emancipation by the sovereign power, the United States, was legal at the time it was made, and is, therefore, binding on the parties by and between whom it was made.

A PPEAL from the Thirteenth Judicial District, parish of Tensas.
Hough, J. A. N. & H. N. Ogden, for plaintiff and appellant.
Julius Aron and *Farrar & Reeves*, for defendant and appellee.

This case was tried by a jury in the court below.

LUDELING, C. J. The plaintiff sued the defendant for services rendered in carrying her slaves and other property to Texas, and managing and taking care of the same for her, etc., under a written contract.

The defense is a general denial, and that the contract "is illegal and invalid, and is reprobated as immoral and opposed to all laws human and divine," etc.

The plaintiff has proved the written contract, and that he faithfully performed the services undertaken. The defendant has failed to convince us that the defense has any merit ; the contract was lawful at the time it was entered into.

It is therefore ordered that the verdict of the jury be set aside ; that the judgment of the district court be reversed, and that there be judgment in favor of the plaintiff against the defendant for thirty-six hundred and thirty-four dollars and forty-seven cents, with five per centum interest thereon from judicial demand, and costs of both courts.

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No. 2333.—SUCCESSION OF THE MISSES MORGAN.—On the petition of ELLEN STEWART and others, claiming as representatives of Thos. A. Morgan.

Representation is a fiction of law, which places the representative in the position, degree and rights of the person he represents. The representative of the deceased does not receive by transmission from the person he represents, but he is endowed by the law with the rights to the succession of such person. He is not, therefore, by the fact of representation merely, rendered personally liable for the debts of the person whom he represents.

Where parties have died, leaving a succession which falls exclusively to the collateral heirs, there being no heirs in the direct line, either ascending or descending, and one of the branches of the collateral line claims by representation, such representative branch can not be compelled to collate a debt which their ancestor owed to the deceased, nor are they bound to collate gifts made by the deceased to their ancestors. C. C. 1313.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. R. Hunt*, for appellants. *Wm. O. Denegre*, for appellees.

HOWE, J. The Misses Morgan, four sisters, perished in a common calamity on the twenty-eighth November, 1867. Dying intestate, and leaving neither ascendants nor descendants, their succession was claimed by a sister, Mrs. Mary Harrod, and a brother, William H. Morgan, to the former of whom letters of administration were granted. Thomas A. Morgan, a brother of the half blood of decedents, died in 1858, leaving seven children, his heirs, whose claim to one-sixth of this succession, by representation, is the subject of controversy before us. The succession is valued at about \$52,000.

It is admitted that Thomas A. Morgan died insolvent, that he was indebted at the time of his death to the Misses Morgan in the sum of \$12,850, an amount largely exceeding what would have been his distributive share in their succession had he survived his half-sisters; that no part of this sum has been paid; and that the claimants by representation, his children, long since renounced his succession.

The judge below decided in favor of the claims by representation of the children of Thomas A. Morgan, and decreed them to be heirs for one-sixth of the succession of the Misses Morgan, that is to say in the proposition of one forty-second part to each. From this judgment Mrs. Harrod, individually and officially, and William H. Morgan have appealed.

The appellees contend that as representatives of their father, T. A. Morgan, they are collectively entitled to one-sixth of the estate of their aunts without regard to the larger debt he owed those aunts; because, having renounced the succession of T. A. Morgan and their rights of inheritance not being acquired by transmission *through* him, but conferred by the law in the form of a representation of him, they can not be compelled to discharge his obligations or collate his debts.

The appellants, on the other hand, contend that, as the children of T. A. Morgan do not, and indeed can not, claim a share in the estate

Succession of the Misses Morgan.

of their aunts in their own right, but only by representation of their father, they can have no greater rights than he himself if still alive could exercise; that is to say, the right to one-sixth of the estate, less the sum of \$12,850; and that as this admitted debt is larger than the distributive share the claim of his representatives must be dismissed.

Representation is a fiction of law, the effect of which is to put the representative in the place, degree and *rights* of the person represented. C. C. 890; C. N. 739; Inst. l. 3, t. 2; Nov. 18, cap. 4, 118, 127.

A dead man can neither get nor give; he can neither inherit nor transmit. The representative of the deceased person does not receive by transmission from that person and *jure alieno*; he receives by designation of law and *jure suo*. It follows therefore that the representative is not by the fact of representation merely rendered personally liable for the debts of the person whom he represents. He is endowed by the law with the rights of the latter in a certain succession, but is not laden with the obligations of that latter to the rest of the world. He is not an accepting heir, but a designated representative. This doctrine is elementary, and we do not understand that its correctness is questioned by the appellants.

But to reach the exact question in this case we have to go one step further, and inquire, not merely if the appellees are liable for the debts of T. A. Morgan to the outside world (if we may use the expression), but if their share in the succession of the Misses Morgan must be reduced by the amount of debts due by their pre-deceased parent to the Misses Morgan. The question is not free from doubt; much may be said on principle for each side, and either view may be copiously illustrated by analogies drawn from the jurisprudence of France. But after a careful examination, both of our own books and the French authorities, we have decided to follow the rule indicated in the case of Destrehan, 4 N. S. 557. That case was hotly contested. The court (Judge Matthews delivering the opinion) held that the share of a grandchild, coming by representation to the succession of his grandfather, should not be reduced by the amount of a *debt* due by the pre-deceased father to that grandfather. The eminent counsel against whom the decision was pronounced made an earnest application for a rehearing, in which they urged the same views substantially as those now pressed upon us by the appellants. The rehearing was granted, and after argument the opinion of the court, adhering to its former decision, was delivered by Judge Porter, who gave the subject an elaborate review. He admitted that if the article of the Code above quoted, which defines representation to be a fiction which places the representative in the place, degree and *rights* of the person represented, stood alone, it would go the whole length for which the appellants at bar contend; but he proceeded to show that it did not

stand alone, and that there were several cases in which, in a certain sense, the representative had greater rights than the person he represented. The most striking perhaps is that provided for in O. C. 148, article 26, and in article 897 of the present Code, which declare that "when a person has been disinherited by his father or mother, or excluded from his succession for unworthiness, his children can not represent him in the succession of their grandfather or other ascendants, if he is alive at the time of the opening of the succession; but they can represent him if he died before."

Now, the case at bar is rather stronger than that of Destrehan in favor of appellees. In that case it was admitted that the share of the grandchild must be reduced by any *gift* made to the father, the thing given being collated. C. C. 1318. But in this case the appellees, collateral relatives, are not bound to collate either gifts or debts. C. C. 1313.

It is urged by appellants that the effect of the judgment of the court below is inequitable. It must be remembered, however, that there is no question of natural right in the case. The right of property terminates with the death of the proprietor. We brought nothing into this world, and it is certain that we can take nothing out. The right of succession is not a natural but a civil and social right. Succession is a civil institution, by which the law transmits to a new proprietor, designated in advance, the thing that the preceding proprietor has just lost. Especially is this true of the succession of collaterals, *ab intestato*, under the provisions of law which create and control the fiction of representation. The parties to this controversy are all collaterals, the succession is intestate, its distribution is regulated by rules that are purely artificial, and the question in controversy is one purely of law.

It is therefore ordered that the judgment appealed from be affirmed with costs of appeal.

Rehearing refused.

No. 3109.—SUCCESSION OF CYPRIEN H. LABRANCHE. Contest involving the Validity of a Will.

The parish court has exclusive original jurisdiction in the matter of receiving proof of last wills and testaments. Therefore, if the validity of a will be attacked on the ground of mental unsoundness of the testator at the time it purports to have been made, the parish court has exclusive jurisdiction to try the issue.

APPEAL from the Parish Court, parish of St. Charles. *O. J. Flagg*, Parish Judge. *J. D. Augustine* and *J. Michel*, for appellants. *C. T. Bemis*, for appellee.

TALIAFERRO, J. A question of jurisdiction is presented in this case. The appellants, claiming the succession of the decedent as collateral

 Succession of Labranche.

heirs, presented a petition to the parish court for an inventory, which was made in conformity with the order rendered.

A day or two afterwards an instrument purporting to be an olographic will, was presented with a petition to the court for its opening and probate. The will was proved and ordered to be recorded and executed. The appellants filed an opposition to the probate of the will, alleging themselves to be the legal heirs of C. H. Labranche, averring the will presented to have been obtained by collusive and indirect means; that the deceased, at the time the will purports to be dated, was, by means of mental incapacity, unable to make a will; that it contains a *fidei commissum* reprobated by law, and for that reason is null and void.

Subsequently the defendant, who, claiming as universal legatee under the will, filed an exception to the jurisdiction of the court so far as it relates to the question of mental alienation. The exception was sustained, and the suit in relation to the contest about the will dismissed. The opponents have appealed.

We think the court erred. The suit is not brought for or against the succession. It is not a money demand, nor is it brought for a specific thing. The controversy involves only the validity of the will. Courts of probate, having exclusive original jurisdiction over the matter of receiving proof of last wills and testaments and ordering their execution, have jurisdiction to examine into their validity and to declare them void, or to refuse an order for their execution. C. P. 924; 5 La. 395; 17 La. 4; 10 Rob. 193.

It is therefore ordered, adjudged and decreed that the judgment of the parish court dismissing the opposition of the appellants, be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance to be proceeded with according to law, the appellees paying costs of this appeal.

Rehearing refused.

 No. 3200.—CITIZENS' BANK v. BOUVARD ST. AMANS.

Stocks pledged to and in the possession of a bank as security for money loaned, constitute a standing acknowledgment of the debt, and prescription is interrupted during the time of the pledge. 21 An. 128; 22 An. 107.

If the appellant fails to make an assignment of errors in an appeal from an order of seizure and sale, the appellate court will only examine the case in so far as to ascertain whether the fiat of the judge *a quo* is sustained by authentic legal evidence.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborne, J. Pierson & Levy*, for appellant. *Chaplin, Morse & Chaplin*, for plaintiff and appellee.

HOWELL, J. This appeal is taken by third persons, the heirs of Mrs. St. Amans and creditors of the husband and father, the defendant, by

virtue of a judgment against him in their favor, and is taken from an order of seizure and sale against property mortgaged to the Citizens' Bank in March, 1838, by the said Mr. and Mrs. St. Amans.

The appellants, who allege themselves to be third possessors of the property under their said judgment, file the plea of prescription of five years in this court against the obligations dated twenty-fifth May, 1838, on which the order of seizure and sale was granted. It appears, however, that the stock of the defendant was pledged to the bank as security for the payment of these loans, and according to the ruling in *Citizens' Bank v. Johnson & Bogan*, 21 An. 128, and *Police Jury of West Baton Rouge v. J. V. Duralde*, 22 An. 107, this operated a suspension of prescription.

There is no assignment of errors annexed to the record, and we have only to see whether or not the fiat of the judge is sustained by legal authentic evidence.

The order was granted upon two stock notes signed by the defendant and identified with the act of mortgage, also an authentic copy of said act, executed by the defendant and his wife, containing her renunciation in due form; also an act of acceptance of said mortgage.

We find no error in the granting of the order of seizure and sale. Any irregularities subsequent thereto can not be corrected on this appeal.

Judgment affirmed.

22	294
44	68

MS 294
51 1362

No. 2031.—SUCCESSION OF PIERRE PEREUILHET.—On Opposition of
Mrs. DORIA HAUTHO.

Services rendered a person during his last illness, as nurse and housekeeper, are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such services is to pay a fair compensation therefor. The fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine, does not impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and the services rendered were merely incidental to that mode of living.

APPEAL from the Second District Court, parish of Orleans. *Duvignaud*, J. *G. Schmidt*, for opponent and appellant. *Edward C. Guillet*, for curator and appellee.

Howe, J. The opponent claimed \$2875 for services as house servant and nurse. Her claim having been rejected, she has appealed.

The record shows that the deceased was a bachelor of some means, and that the opponent, with her children, resided in the house with him for some years prior to his death, which occurred July 4, 1867. He kept no other servant, and had no other nurse. The opponent kept house, did the marketing, cooking and housework, and for some months prior to his death nursed him night and day. He died of consumption;

Succession of Pereuilhet.

his disease was distressing and protracted, and he was an exacting patient. The opponent was assisted by her daughter, fifteen years old, and her son, a boy of twelve. One of the attending physicians speaks in great praise of the patience and assiduity with which she performed her duties of nurse, and concludes:

"I can not estimate the value of the services rendered so delicately, and rendered in circumstances requiring so much patience. I can only state that if I were placed in the same circumstances, the probability is that I would leave to the person who had thus comforted me in my last days all what I possessed of worldly goods, and my blessing as a true Christian."

We think it well settled that services rendered under circumstances like these will not be deemed to be gratuitous. No one is readily presumed to give such useful and tedious labors except under a *quasi* contract for a fair compensation. "It must be remembered," as this court said in *Camfranc v. Pilie*, 1 An. 198, "that according to the elevated morality of the civil law, no one ought to enrich himself at the expense of another, and that where a party calls upon another to do a thing, the law, in the absence of contrary proof, supposes an obligation to pay for what is done. For actions without words, either written or spoken, are presumptive evidence of a contract, where they are done under circumstances that naturally imply a consent to such a contract.

It is clear, from the record in this case, that the estate of Pereuilhet was considerably enriched by the industry and the patient care of the opponent. If he had hired other servants and nurses, the amount coming to the heirs who now resist her claim would have been considerably reduced.

We gather from the record, as a whole, a *quasi* contract on the part of the deceased to compensate the opponent for the services mentioned.

In their answer to the opposition, the appellees made the following allegation: "That said Doria Hautho for several years next preceeding the death of P. Pereuilhet, lived with him as his concubine, and was so living with him at the time of his death;" and some testimony on this subject was introduced.

In the first place, the evidence on this point does not make the truth of the averment very clear; and in the second place, if it did, the fact as alleged would not, in itself, vitiate the claim of opponent. An employer can not pay off a female employe by robbing her of her virtue. Such a method of extinguishing an obligation is not known to the law. If concubinage had been alleged and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been

different; but such is not the allegation, much less the proof; and we certainly will not presume that such was the fact.

In *Viens v. Brickle*, 8 M. 7, where concubinage, though proved, did not appear to have been the motive of the association out of which the claim arose, the court, Martin, J., said: "We can not view this circumstance as preventing or destroying any right which she may have on the defendant for a remuneration, and perhaps it increases his obligation, in a moral point of view, of doing her justice, instead of lessening it in a legal."

We think the opponent entitled to recover, and we fix the amount at \$900, with interest from judicial demand.

It is therefore ordered that the judgment appealed from be avoided and reversed; that the opposition of Mrs. Doria Hawtho be maintained for the sum of nine hundred dollars, with interest from December 17, 1867; that the tableau be amended by placing her as a creditor thereon for the said sum, and that the appellees pay the costs of both courts.

Rehearing refused.

No. 2929.—A. J. J. BARUS v. H. BIDWELL et al.

The effect of a judgment as between codefendants must be construed with reference to the pleadings and the nature of the obligation declared upon. Therefore, if the obligation sued upon be not solidary as to the drawers, yet if the acceptor is bound unconditionally for the whole debt, he can not maintain an injunction to restrain the sale of his property to pay the same on the ground that his codebtors are not being pursued for their share, even though they be not bound *in solido*.

The husband can not maintain an injunction to stay the sale of his property, seized to satisfy a judgment rendered against him, on the ground that before the seizure he had transferred the property seized to his wife in payment of a debt which he owed her. In such a case, if the wife, whom it is alleged by the husband is the owner of the property seized, does not complain, the husband can not.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Rightor & McCollam*, for plaintiff and appellee. *E. Filleul*, for defendants and appellants.

WYLY, J. The plaintiff enjoined the execution of the judgment of the defendant, H. Bidwell, against him on several grounds. The most important is that the judgment was a joint one against him and two other judgment debtors, notwithstanding which the execution issued against him for the full amount of the judgment.

On this ground the court perpetuated the injunction, and the defendant, Bidwell, has appealed.

We think the court erred. The plaintiff was sued as the acceptor of a draft, and the prayer of the petition was that the said acceptor and the drawers of the draft be condemned *in solido* to pay the said Bidwell the amount of said demand, with costs, etc.

Although the judgment was against the acceptor and the drawers

 Barnes v. Bidwell et al.

for the amount of the draft, the words *in solido* being omitted, we think the plaintiff, the acceptor, is bound in the decree for the full amount thereof. It is an established rule that judgments, as between the parties, must be construed with reference to the pleadings and the nature of the obligation declared on, and although the obligation of the plaintiff was not solidary with the drawers, yet as acceptor he was bound for the whole debt, and the judgment against him must be construed as binding him for the full amount thereof. 14 An. 831; 15 An. 679; 16 An. 365; 3 L. 283.

As to the ground set up in the petition for injunction that the property seized did not belong to the plaintiff, but to his wife, to whom he had conveyed it by an act of giving in payment, we will remark that it is no ground for him to enjoin; if the owner of the property did not complain, he should not. The other grounds for the injunction are unworthy of serious consideration.

As the answer of the defendant to the petition for injunction asks for the dissolution thereof, with damages against the plaintiff and his surety on the injunction bond, we think, under the circumstances, the amount of damages should be fixed at three hundred dollars.

It is therefore ordered that the judgment of the court *a qua* be avoided and annulled, and that the injunction herein be dissolved; and that the plaintiff in injunction and the surety on the injunction bond be condemned *in solido* to pay the defendant, H. Bidwell, three hundred dollars damages and costs of both courts.

No. 2896.—SUCCESSION OF E. CORDEVILLE.

Several appeals from different judgments, rendered in the settlement of a succession, may be cumulated in one record, if all the parties interested enter into an agreement to that effect. In such a case, if the bonds given in such case are sufficiently identified with the judgments from which appeals have been granted, and the respective amounts correspond with the amounts fixed by the order of the court in each case, and be signed by the proper parties, the appeals will not be dismissed for irregularity.

A judgment homologating an administrator's account and tableaux, before the lapse of ten days after citation, is a nullity.

By a sale of succession property, mortgages existing thereon become transferred to the proceeds of the sale, and the purchaser of the property may have the mortgages erased from the records of the mortgage office by rule to that effect on the recorder of mortgages.

A judgment recognizing the widow as legatee under the will, must conform to those provisions in the will which award the legacy.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. L. Castenau and Carleton Hunt and M. A. Dooley*, for appellants. *A. L. Tissot and Charles Louque*, for appellees.

HOWELL, J. Two appellants are before us with appeals taken by them respectively from several judgments rendered in the progress of the mortuary proceedings herein, and made returnable on the same day, third Monday of May, 1870.

John Dawson, who was superseded in his office by the appointment of Mrs. Commagere, the sister of the deceased, as dative testamentary executrix, and Mrs. Cordeviolle, widow of the deceased, appealed from a judgment amending and homologating the account rendered by Dawson to his successor. The widow also appealed from a judgment ordering the erasure of the mortgage appearing on the records by the recording of her marriage contract; one amending and homologating an account filed by the dative executrix, and one recognizing her as legatee for an annuity under the will, but refusing to recognize a mortgage resulting from the said marriage contract.

A motion is made to dismiss those appeals on grounds not well taken. That in regard to the appeals being in one transcript is cured by agreement. The bonds are for the amounts fixed by the judge, and, taken with the petitions for appeals, sufficiently identify and describe the judgments appealed from, and the one signed by the widow maintains the appeals in her individual capacity. Her interest as legatee is sufficient to authorize an appeal.

ON THE MERITS.

We find no error in the judgment on Dawson's account which he was ordered to render to his successor. 19 An. 22; 3 An. 624. The judgment which he obtained homologating it before the expiration of the legal delay was a nullity, and the opposition of the executrix was within time, having been filed before the lapse of ten days from *service of citation* to her.

The judgment ordering the recorder of mortgages to erase the mortgage resulting from recording the contract of marriage, and reserving to the widow "all her rights and privileges on the proceeds of the sale of said real estate for the payment of the annuity donated to her by the deceased in her marriage contract," is one of which the said widow has no good cause to complain. The sale of the property raised the mortgage therefrom and transferred it, if it legally existed, to the proceeds. But, besides this, the court had already decreed that said mortgage did not legally exist on the real estate of the succession, and no appeal was taken therefrom.

We think, also, the judge *a quo* decided correctly upon the oppositions to the account filed by the dative executrix, who does not complain of the items rejected, and the evidence seems to sustain those allowed.

As to the judgment recognizing the widow as legatee under the will for the sum of twelve thousand five hundred francs, a correction should be made to conform to the provisions of the will, which make it an *annuity* to be paid out of the interest of the securities in which the proceeds of the estate are to be invested for the purpose. We do not

Succession of Cordeviolle.

undertake to order the proceeds to be transmitted and invested as contemplated, but simply to declare the widow to be entitled to said annuity according to the will.

The appeal from the judgment appointing the dative testamentary executrix is not now before us.

It is therefore ordered that the motion to dismiss be overruled; that the judgment amending and homologating the final account filed by John Dawson, late curator, and signed on twelfth April, 1870, the one ordering the erasure of the mortgage claimed by the widow as resulting from the recording of her marriage contract, and signed March 28, 1870, and the one amending and homologating the provisional account filed by the dative testamentary executrix, and signed April 1, 1870, be respectively affirmed. It is further ordered that the judgment rendered on March 31, 1870, and signed on the thirteenth April, 1870, recognizing the widow Cordeviolle as legatee under the will for the sum of twelve thousand five hundred francs, be so amended as to recognize her as legatee under the will for an annuity of twelve thousand five hundred francs, to be paid in accordance with the provisions of the said will, and that as thus amended said judgment be affirmed. Costs of appeal to be paid by the succession.

Rehearing refused.

23	286
44	877

No. 2205.—FELICITE KOHLER v. J. P. WALDEN et als.

The prescription of one, three and five years does not apply to actions against a sheriff and his sureties on his official bond, for misfeasance or malfeasance in office; such action is prescribed by two years, beginning from the date of default. Revised Statutes of 1870, p. 688.

APPEAL from Fourth District Court, parish of Orleans. *Théard, J. A. G. Semmes*, for plaintiff and appellant. *Fellows & Mills*, for defendants and appellants.

HOWELL, J. This is an action upon a sheriff's bond to recover the sum of \$1000, which the defendant Walden, then sheriff of Orleans, was ordered on twenty-eighth September, 1861, by the Sixth District Court of New Orleans, on the demand of the plaintiff herein, to retain in his hands until the further order of said court, being a part of the proceeds of property sold in the suit of *Brinkman v. The Succession of Frederiek Kohler* in said court. The writ in said suit, issued in August, 1861, and the said amount was paid to the sheriff on second December, 1861, and on seventh July, 1864, a judgment was signed awarding to the plaintiff in this action the said sum under the homestead act. The defense is that the sheriff had ample funds in bank out of which plaintiff might have made her claim, but she has lost it by her own *laches*; that the sheriff was forbidden by military orders to pay this or any

Felicite Kohler v. Walden et als.

other claim, and that the sureties are not bound *in solido*. Judgment was rendered against the defendants *in solido*, and the ex-sheriff and two of his sureties have appealed.

In this court they have filed the plea of prescription of one, three and five years. Neither of these prescriptions applies to this action. The cases cited by defendants were suits against sheriffs personally for damages and not on their official bonds for breaches thereof. The prescription in favor of sheriffs and their securities, against their acts of misfeasance, non-feasance, etc., is two years from the day of the omission or commission of the acts complained of. Acts 1855, p. 366, § 10; Revised Statutes 1870, p. 688, § 3546. This prescription is not pleaded, and we can not supply it. If it were, there is nothing in the record to fix the day of default, from which prescription would begin to run, to wit: the date of demand by the judgment creditor (plaintiff herein) and non-payment by the sheriff, admitting that this prescription can apply to this or similar cases. See 14 An. 216.

The defense is not sustained by the evidence or the law. Plaintiff has received \$350 on account, and the judgment was rendered for \$650. This case differs somewhat from the one of Harvey, syndic, v. J. P. Walden et als., recently decided.

Judgment affirmed.

Rehearing refused.

No. 2021.—DENNIS CAVANAUGH v. JOHN COLEMAN & Co.

In this case two members of the firm of John Coleman & Co. bought out the interest of a third member and assumed all the liabilities of the firm which had been dissolved. Dennis Cavanaugh was a creditor of the firm, for which he brought suit; Dennis Cronan, the retiring partner, was a creditor of Cavanaugh to an amount equal to the debt of the firm to Cavanaugh. By an agreement of parties the matter was left to arbitrators selected by them, who examined and adjusted the accounts, and awarded to Dennis Cronan the amount which the firm owed to Cavanaugh. This award of the arbitrators was shown on the trial of the case to have been agreed to by all parties. Held—That by this settlement confusion took place, and the debt of Cavanaugh against the firm was extinguished by the payment by the firm to Dennis Cronan, the same as if it had been paid to Cavanaugh and by him paid to Cronan; that the transaction was complete, and that Cavanaugh could not recover from the firm.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. Ad. Rozier*, for plaintiff and appellee. *O. Roselius* and *Alfred Philips*, for defendants and appellants.

LUDELING, C. J. The plaintiff claims the sum of eight hundred and eighty dollars, balance due him for flagging materials furnished and labor done for account of said firm, according to settlement had in the year 1861.

The firm of John Coleman & Co. was dissolved about six months before the institution of this suit, and John Coleman and George Cronan, two of the members, bought the interest of the other member

of the firm, Dennis Cronan, with its assets, and assumed the payment of the debts. In the act of settlement between the partners it is stated that an amount stated to be due by the firm to Thomas Cavanaugh is not included in the sale, and that the receiver of the firm shall retain the amount in his hands and pay it to Cavanaugh or Dennis Cronan, as the court might thereafter order.

The defendants severed in their defense. Dennis Cronan filed first a general denial and he called in warranty his former partners. They admitted the plaintiff's claim against the firm and their assumption of the debts of the firm; but they aver that in the act of settlement, whereby they agreed to pay the debts of the firm, it was agreed that they should retain in their hands the amount due said plaintiff by the firm, until such time as there should be an order of court obtained for the payment of the same, as Dennis Cronan claimed that he was a creditor of said plaintiff to the amount of the plaintiff's claim against the firm, and they express a readiness to pay the sum to whichever party the court may adjudge the debt to be due.

Then Dennis Cronan filed a peremptory exception to plaintiff's demand, alleging that the claim of plaintiff had been extinguished by a settlement made between them on the third August, 1861.

The evidence shows that Cavanaugh had a debt against the firm, of which Dennis Cronan was a member; that they agreed to adjust and settle these two claims; that the plaintiff selected J. N. De Pouilly and Dennis Cronan selected John Lynch, who examined the respective accounts, adjusted them and reported that "on settlement it appears that there is a balance of \$445 81 due to D. Cronan." This memorandum was offered in evidence, and the gentlemen who made the settlement testified in this case that both parties expressed themselves satisfied with it. If we regard this settlement as an agreement between Cavanaugh and Cronan to mutually transfer the claims of each to the other, then the claim of Cronan against Cavanaugh, to the extent of the latter's debt against the firm, was extinguished by confusion and Cronan owned the debt against the firm. The settlement was, in effect, the same as if Cronan had taken this money and paid the partnership debt.

It is therefore ordered that the judgment of the district court be avoided and annulled, and that there be judgment rejecting plaintiff's demand, with costs of both courts.

Rehearing refused.

No. 2520.—A. MARRERO v. JACOB BARKER et al.

An appeal will lie from an interlocutory decree dismissing a rule taken to dissolve an injunction which has been granted to stay proceedings by executory process, if the petition for injunction puts at issue the validity and correctness of the order of seizure itself. In such a case an irreparable injury might follow, and an appeal will therefore lie.

If the act of mortgage has been partially destroyed by fire, by the destruction by fire of the office of the notary who was the custodian thereof, but the original document is sufficiently preserved so that its purport and extent is easily comprehended, words used by the notary in his certificate explaining how certain defects occurred will not so change its character from that of an authentic document to that of an act under private signature that the judge can not issue executory process thereon.

APPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. Sambola & Ducros*, for plaintiff and appellant. *Preston & Labatt*, for defendants and appellees.

HOWELL, J. The plaintiff having enjoined an executory process on several grounds, the defendant, Barker, moved to dissolve the injunction with damages, and from the judgment dismissing his rule, this appeal is taken.

It is urged in argument by plaintiff that this is a mere interlocutory decree, from which no appeal lies. As a rule, this position is correct, but where the judgment practically decides the issue, and has the effect of maintaining the grounds of the injunction, which go to the marrow of the executory process, irreparable injury may result, and in consequence an appeal lies from the judgment refusing to dissolve the injunction.

In this case, the petition for an injunction is virtually an opposition to the executory proceeding, and the rule to dissolve may be viewed as an answer, putting at issue all the grounds in the petition, and in disposing of the rule, the district judge passed on all those grounds, and decided that the executory process did not issue upon authentic evidence. His judgment leaves nothing more to be decided in the injunction suit, and operates a perpetual bar to any further proceedings in the executory suit. It is really a decision of the injunction upon its merits. In the case of *Riley v. Lynd*, 3 M. 229, an appeal from a similar decree was maintained. We quote the language of the court on this point as appropriate here: "A previous question is raised by the appellee as to the jurisdiction of this court. He contends that this is not a case of which we can take cognizance, inasmuch as the order complained of is not a final judgment. The law has, indeed, limited the jurisdiction of this court to appeals from final decisions and judgments, and this court, in conformity thereto, has already refused to take cognizance of appeals from interlocutory decrees; but at the same time they have declared that, as to what shall be considered as a final decision or judgment, each case must speak for itself. When an order, not strictly in the form of a final judgment, is in its effect tantamount to it, this court has and will exercise jurisdic-

Marrero v. Baker et al.

tion. That this is such a case, needs not to be demonstrated. On the one hand, the judgment rendered in favor of appellant is a dead letter if the decree complained of is suffered to subsist; on the other, the appellant is barred from bringing any other action for the same cause against the appellee, for his case is already adjudged. No decision can be more effectually final; it is therefore a proper subject for the jurisdiction of this court."

The district judge considered the copy of the act of mortgage in this case unauthentic because to his certificate that it is a true copy, the notary has added exceptions and limitations showing that it is not a true copy. It reads:

"I, John Bendernagle, a notary public in and for the parish of Orleans, and custodian of the records of Hugh Madden, (notary, deceased,) duly commissioned and qualified, do certify the foregoing to be a true and correct copy of the original act in the records of Hugh Madden, (notary, deceased,) except such parts as are obliterated by being burned by fire, which destroyed said notary (Madden's) office, which parts are marked on the copy thus (*)."

This means that the certified copy is a true copy of the original as it now exists, but that the original itself is injured, or to some extent defaced by the fire, which destroyed the notary's office, and the only proper question is, is it an authentic act of mortgage for the debt evidenced by the notes accompanying it or identified with it, affecting the property ordered to be seized, and available in the hands of third holders of said notes? It is authentic, because it is passed or executed before a notary and two witnesses, and the obliterations are not such as leave any doubt about the debt secured, the notes evidencing the debt, the description of the property mortgaged, and effect of that mortgage as importing a confession of judgment in favor of any holder of the notes. These, the material and essential recitals, being contained in the act, the unessential and immaterial words defaced do not affect the validity of the act. We can not concur in the opinion of the district judge that the "additions" in the certificate of the notary, as they appear, destroy the sufficiency of the certificate or authenticity of the evidence on which the order of seizure and sale was granted. The copy certified by him is not an exact, literal copy of the original as it was when first executed, but is of that now existing, and this original is an authentic act. He used words in his certificate to show how certain defects appeared, and how they occurred. If he was not authorized to certify to this last fact, it may be considered as surplusage, and will not affect the validity of the act as making proof of the original as it really exists.

We are satisfied that the injunction should be dissolved, and the defendant, Barker, permitted to proceed with his executory process.

Marrero v. Barker et al.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the rule taken by defendant be made absolute, and the injunction herein be dissolved, with a judgment against the plaintiff, Marrero, and his surety, *in solido*, for ten per cent. on the amount of the judgment enjoined, as damages, and costs in both courts. Rehearing refused.

No. 2267.—J. R. JONES v. C. J. JONES and J. LEVOIS & Co.

A judgment that has been rendered on default on a citation that has been served on a third party, whom it is neither alleged nor shown was the agent of the defendant at the time, is null and void, and the nullity will be so declared on appeal.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. James McConnell*, for plaintiff and appellee. *M. B. DuBuisson*, for defendant and appellant.

HOWELL, J. The defendant, J. Levois, asks that the judgment herein rendered on default be reversed as to him for want of legal citation. The return of the sheriff is that he served a copy of the "citation and accompanying petition on J. Levois by leaving same in the hands of D. Jamison, his agent, said Levois being absent from the city at the time of service."

There is no allegation or proof that D. Jamison was the agent of Levois, and the service is illegal, and no appearance was made by appellant. But plaintiff contends that the evidence shows that citation was received. The following is the evidence relied on. Plaintiff, sworn, says: "The defendants admitted the signature to the lease sued upon. They have paid \$200 on account of the claim sued for since the suit. The claim sued for is just and due, subject to the above credit. The signature of the surety to the lease is made by the agent of the surety, Mr. Porteous, who informed me to make the act of suretyship."

This by no means proves that J. Levois paid anything on the claim or had been served with citation. C. J. Jones is the lessee, and J. Levois & Co. are his surety through the agency of Mr. Porteous (and not D. Jamison), according to the above statement of plaintiff. There is nothing else in the record to connect Levois with the contract of lease or the suit, until a copy of the judgment was served upon him, when he took this appeal. The judgment against him is without legal foundation. The petition, however, having been filed, the plaintiff is entitled to an opportunity to have the sureties cited.

It is therefore ordered that the judgment herein against J. Levois, appellant, be reversed, and the cause remanded to the lower court to be proceeded in according to law. Plaintiff to pay costs of appeal.

Mrs. Gayarre v. Millaudon et al.

No. 2260.—MRS. GAYARRE v. B. L. MILLAUDON et al.

Where the record shows that the plea of prescription was filed in the court below after the case had been argued and submitted to the judge, and the judgment of the court maintains the plea, the judgment will be annulled on appeal, and the case will be remanded to be proceeded with according to law. The rules of practice are well settled that all pleas of whatever description must be made before the case is submitted for decision.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Elmore & King*, for plaintiff and appellant. *E. Bermudez*, for defendants and appellees.

TALIAFERRO, J. The plaintiff having obtained a final judgment against a former sheriff of the parish of Orleans for the sum of \$365 70, issued execution, which was returned *nulla bona*. Some time afterwards she brought suit against the defendants in this suit as sureties of the sheriff on his official bond, and the defendants set up the prescription of two years in bar of her action. The plea was sustained, and the defendants had judgment in their favor. The suit now before us was instituted to annul that judgment, and to recover from the defendants \$520 84, with interest, made up of the sum recovered by judgment against the sheriff, viz: \$365 70, and various items of costs, interest, etc., amounting to \$155 14, which, superadded to the amount of the judgment sought to be annulled, make up the sum of \$520 84.

To the form of this action the defendants excepted, on the ground that the proceeding taken to annul the judgment referred to can not be cumulated with the demand for the judgment sought for in the former case against the sureties, and on the further ground that so far as plaintiff claims the nullity of the judgment described, the petition discloses no cause of action. The exception was sustained and the plaintiff's suit dismissed. The plaintiff thereupon appealed.

The plaintiff avers in her petition that the plea of prescription, by which her action against the sureties was defeated, was brought into the case without her knowledge, and by indirect and fraudulent means; that the plea of prescription was indorsed, "filed sixteenth of December, 1868," and the case argued and submitted to the court for decision by both parties on the fifteenth of December, 1868. The plaintiff alleges that had she had knowledge of the filing of the plea and an opportunity to introduce evidence, she could have shown that the plaintiff was not authorized to recover on the plea. That neither she nor her counsel had any notice whatever of this plea of prescription until some days after the judgment in the case was signed.

This was a grave irregularity in practice, and one which should not be tolerated. We deem it proper, therefore, to remand the case. See Code of Practice, art. 607.

It is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance to be proceeded with according to law.

No. 3272.—ALEXANDER MCKEE, Use, etc., v. WILLIAM H. BROWN.

The charter of the late City of Jefferson required a petition signed by the owners of one-fourth of the land on the entire length of the street to authorize the Council to cause a banquette to be constructed thereon, and to impose the burdens thereof on the front proprietors. Under this statute it was held that if the Council gave out a contract for banquetting a portion of the street, on the basis that more than one-fourth of the land owned by the proprietors on the part of the street which was improved had petitioned the Council therefor, that then and in that case the front proprietors of the part of the street so improved could not be compelled to contribute to the expense thereof, because the contract had been given out by the Council in violation of law.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Fellows & Mills*, for plaintiff and appellee. *W. B. Koontz & Elliott*, for defendant and appellant.

HOWE, J. The only question involved in this case is the construction of the following clause in paragraph twelve, section seven, of the charter of the late City of Jefferson; act of 1867, p. 111: "When the proprietors of land fronting on any public street or avenue, comprising one-fourth of the front on said street, shall petition the Council therefor, the Council shall cause the streets to be opened, widened or improved with banquettes, sidewalks, shell or plank roads, or paved streets, if after thirty days' notice a majority similarly constituted of front property owners shall not object thereto."

It was decided by the court *a qua* that these proceedings might be provoked by the proprietors of one-fourth of the land fronting on a *portion* of the street, in such a way as to compel the Council to improve that portion only, and force the proprietors of the three-fourths fronting on the same portion to contribute. In this case the work done was flagging on nine squares of Peters avenue, a street which is shown to be forty squares in length. The petitioners, by whom the proceedings were initiated, owned and signed for about one-tenth only of the entire front, but more than one-fourth of the front improved.

The appellant contends that the provision cited must be strictly complied with before he can be compelled to contribute, and that by its terms it plainly requires the proceedings to be provoked by the request of the owners of one-fourth of the front on the whole street. We think his views correct. The language of the statute is plain; its object is to confer a power similar in character to that of expropriation, and it ought not to be extended by implication.

The language being plain, the argument from inconvenience, urged by appellee, is not satisfactory. The fact that a large portion of Peters avenue lies in the swamp, and that the front proprietors on that portion would not be apt to join in the necessary petition for banquettes, while it might help to explain doubtful language, could not confer on the City of Jefferson any powers beyond those expressly given, nor on the plaintiff any right against the defendant beyond that which springs from a strict compliance with the statute.

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It may be remarked that the charters of New Orleans have used different language on this subject. Thus the charter of 1856 said: "That whenever one-fourth of the owners of real property, fronting upon any unpaved or unbanquetted street in the city of New Orleans, shall by petition, signed by petitioners and addressed to the Common Council of said city, ask for the paving or for the banquetting of said street, *or for any portion thereof*, said Common Council shall cause said petition to be published; and if a majority of the owners of real property fronting on said street, *or said portion thereof*, shall not, by memorial addressed to said Common Council, object to the same, said Common Council shall order said paving or banquetting to be made," etc. Acts 1856, p. 164, sec. 119, 120. And the charter of 1870 has similar provisions.

There is no reason to suppose this difference between the powers conferred on New Orleans and those conferred on Jefferson to have been accidental, and the fact seems to justify our conclusion.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment for defendant with costs.

No. 3274.—STATE OF LOUISIANA v. MECHANICS' AND TRADERS' BANK.

The free banking law of the State which exempts banks organized under its provisions from the payment of a license, does not exempt such banks from the imposition of a tax on capital. On the contrary, the statute expressly provides for such a tax.

A taxpayer who fails to make complaint of excessive valuation within the time allowed by law for that purpose, can not afterward be heard unless he first show some valid reason for not having made such effort; second, he must show some grave error to his prejudice; and third, its precise amount, failing in which, judgment will be given against him for the amount of the assessment.

A PPEAL from the Third District Court, parish of Orleans. *Emerson, J. S. Belden* and *Hornor & Benedict*, for the State, appellee. *Randolph, Singleton & Browne*, for defendant and appellant.

HOWE, J. Suit for State tax on capital and real estate. Defendant pleaded a general denial, an exemption from taxation under the banking laws of 1853 and 1855, and an exemption of its capital as being nearly all composed of bonds not taxable.

First—The free banking laws which, according to the decision in — An. p.—, inhibit the imposition of a license, do not inhibit the imposition of a tax on capital; on the contrary, they especially provide for such a tax. Acts 1853, pp. 311, 335.

Second—The defendant, on the trial, offered to prove that a part of its capital consisted of bonds exempt by law from taxation. The court refused to receive the testimony, and the defendant excepted. The statement offered, and annexed to the bill of exceptions, showed that if the testimony had been received, the capital still liable to taxa-

tion would have amounted to \$262,000, while the amount assessed was \$300,000. The whole capital is \$750,000. From this, it is claimed, must be deducted bonds not taxable, \$298,000, and real estate already taxed, \$90,000, which leaves the \$262,000 above mentioned. The discrepancy is hardly so great as to support the allegation of the answer "that nearly all its capital consists of bonds specially exempted from taxation." Again, the item of \$398,000 is composed of city bonds and Jackson Railroad bonds. It may well be that the assessors estimated these at their real, and not their nominal value, and that their estimate was correct, and that there really was a balance of \$300,000 of capital left subject by law to be taxed. The bill of exceptions does not inform us that the item of \$398,000 bonds is a statement of their real market value. It may be their face value, and they may be worth less than par.

We do not think the court erred in excluding the testimony. In *New Orleans v. Lesseps*, 11 An. 251, and *State v. Southern Steamship Company*, 13 An. 497, the rule seems to have been settled that one sued for taxes, when he has made no effort in the way pointed out by law to correct the assessment, can not go behind it to show that it is excessive, unless he show: First, some valid reason for not having made such effort; second, grave error to his prejudice; and third, its precise amount. No such showing is made in the case at bar. On the contrary, the impression left by the record is that the assessment was correct. We see no error in the judgment in favor of plaintiff.

Judgment affirmed.

No. 3265.—SUCCESSION OF JAMES N. BROWN, deceased.

The sale of succession property by the testamentary executor, to pay particular legacies, debts, costs, charges of administering, etc., is not inconsistent with the prosecution of a suit for a partition of the succession among the heirs. In the former case the executor has the right to cause the property to be sold to pay the particular legacies, etc., while in the latter the heirs have the right to the action of partition among themselves. Both proceedings may, therefore, be carried on at the same time, without the one being regarded as *lis pendens* with reference to the other.

APPEAL from the Parish Court of Iberville. *Adonis Petit*, Parish Judge. *Samuel Mathews*, for plaintiffs and appellees. *Barrow & Pope* and *William B. Robertson*, for defendants and appellants.

HOWELL, J. Mrs. Feltus, one of the heirs of James N. Brown, who died in 1859, brought suit in November, 1869, against her coheirs for a partition of all the property of the succession, situated in several parishes, and asked that a sale thereof be made to effect the same. To this the defendants and coheirs excepted that a suit for a partition can not be entertained while the estate is under administration by the dative testamentary executor.

23	308
46	638

23	308
123	861

Succession of Brown, deceased.

In October, 1870, and before the above exception was filed, the dative executor presented an account of his administration and a prayer for its homologation and the sale of a plantation and movables in Iberville to pay a special legacy of \$50,000 to one of the heirs, and certain expenses, lawyers' fees, commissions, etc., amounting to about \$20,000. To the account, Mrs. Feltus filed oppositions, and to the prayer for the sale of said plantation and movables thereon she pleaded the exception of *lis pendens*, and alleged that this proceeding of the executor is illegal, and if sustained will render several partitions necessary, which can be closed and settled by one. The plea of *lis pendens* was maintained, and the dative testamentary executor appealed.

The judge, in our opinion, erred. The two suits or proceedings are not between the same parties. The executor is not a party to the suit for a partition; and besides he has the legal right to apply for the sale of property to pay particular legacies and debts, and the heirs can only arrest the sale for such purpose by advancing the money necessary to make the payments and complying with article 1012, or, perhaps, by showing that the payments should not be made. C. C. 1663, 1670, 1671. The objections urged by Mrs. Feltus are, therefore, not sufficient to arrest the sale asked for by the dative executor, whose duty it is to carry out the provisions and directions of the will, and settle the estate.

It is therefore ordered that the judgment appealed from be reversed, and that an order issue for the sale of the property as prayed for by the dative testamentary executor. Costs of this proceeding, in both courts, to be paid by appellee.

ON APPLICATION FOR REHEARING

HOWELL, J. Mrs. Feltus asks for a rehearing upon the ground that the court erred in deciding the merits, when only the exception of *lis pendens* was presented, there being no answer in the case. The question was, did the court *a qua* err in refusing to grant the order of sale asked for by the dative executor, and we regarded the pleas and objections urged against the granting of it simply as an opposition to the application, and, according to the rules of practice, it was the duty of the party making the opposition to present all the grounds thereof at once, and not to protract litigation by setting up grounds of defense *seriatim*.

The issue in this case was made up by the opposition (styled exception) to the prayer for a sale. The oppositions to the account appear not to have been tried.

Rehearing refused.

No. 2257.—G. DE FERIET v. BANK OF AMERICA.

In this case, the evidence shows that plaintiff kept a bank account with defendant; that the book-keeper of plaintiff kept the cash account, made the deposits, etc., and that his relation toward plaintiff were well understood in the bank; that the book-keeper of plaintiff drew a check on the bank for \$2500, to which he forged plaintiff's signature, which was an amount above the account to the credit of plaintiff in the bank; that notice was given by the bank that plaintiff had overdrawn his account, who, on being shown the check for \$2500, said he had not signed it, but did not say that it was a forgery. On seeing his book-keeper, he reported back to the bank that it was all right. Subsequently the book-keeper drew another check on the bank for \$1700, and again forged the signature of the plaintiff thereto, which the bank paid on presentation. On discovering the second forgery by the book-keeper, six months after the first, plaintiff denounced the act.

Held—That the act of the plaintiff, in ratifying the first act of forgery made by his book-keeper, exonerated the bank from all liability for having paid it; that his afterward keeping the book-keeper in his confidential employ misled the bank and threw it off its guard; that, having approved and ratified the first forgery, the bank was excused for paying subsequent checks similarly drawn; that the plaintiff had by his own acts caused the injury, and he must therefore bear the loss.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J.*
A. Robert, for plaintiff and appellee. *Johnson & Dennis*, for defendant and appellant.

HOWELL, J. Plaintiff claims \$2425 41 as the balance due him on deposit. The defendant denies any indebtedness, and avers that plaintiff has overdrawn his account to the amount of \$1774 59, as shown by his checks, which sum is claimed in reconvention. To this demand plaintiff answers, denying the genuineness of his signature to two of said checks, one for \$2500, dated and paid on the thirty-first December, 1867, and one for \$1700, dated fourth and paid sixth January, 1868.

There is no contest before us as to the forgery of those two checks; but defendant and appellant contends that plaintiff, by his conduct in the premises, has justified the bank in receiving and paying them as genuine, and therefore is liable for the amount so overdrawn. When the first of these checks was paid, an overdraft was discovered and immediately reported to plaintiff, who expressed great surprise, and stated that he had drawn no check on that day. Upon going to the bank to investigate the matter, he was told that it was all right, the check had been made good by a deposit. The check was handed to him, and after being carefully examined by him was returned without any remark, as the bank clerk testifies, but he says he stated it had not been signed by him. On his way back to his office he met his book-keeper, who had the sole charge of his bank account and cash, told him of the discovery he had made that the latter (the book-keeper) had counterfeited his signature to the check for \$2500, and asked him if that was the only loss he would sustain, and on being assured it was, he determined to bear it, and not expose the matter, and continued the book-keeper in his employment as before, until about the sixth or seventh of January following, when he discovered

and denounced the forgery of the check for \$1700. The signature to each was in the handwriting of the book-keeper, who, to provide for them, deposited to plaintiff's credit certain checks drawn to the order of plaintiff by a young clerk of the latter, on other banks, and indorsed thus: "For deposit, G. De Feriet, per E. Davenport," the book-keeper. The first of these deposits, made of thirty-first of December, 1867, was realized, and produced a surplus, which was drawn on by several genuine checks of the plaintiff. The check forming the second deposit was returned dishonored, thus producing the overdraft claimed in reconvention.

Under these circumstances, it is clear that the plaintiff can not be heard to disavow the check for \$2500. The case of *Etting v. Commercial Bank*, 7 R. 459, rests on very different facts. So far as was in his power, he condoned this offense of his book-keeper, and made the transaction his own. He could but have known that the deposit made to cover this overdraft was not made with his funds, and that consequently the payment of said check resulted in no injury or loss to him, but that really his balance was increased by the said deposit, out of which his subsequent checks were paid. The only point upon which any doubt can be raised is whether he is liable for the overdraft resulting from the payment of the second forged check.

In the case of *Duconge v. Forgay*, it was held that an authorization to indorse other promissory notes can not be inferred from the fact that the party whose name was forged on them did not publicly denounce the forgery which first came to his knowledge, nor will the neglect to denounce the crime to the public authorities make such party responsible for other forgeries of his name, then unknown to him, or give rise to an action for damages under articles 2294 and 2295, C. C. But here the plaintiff is sought to be made liable, not simply for his failure to denounce the forgery to the public authorities when brought to his knowledge, but because by his words and acts he threw the bank off of its guard and enabled the guilty person to repeat the fraud upon the same party. In the case of *Forgay*, the forger was a friendly acquaintance, but not in his employment, and rather than expose his friend, he guaranteed the payment to the holder of the forged indorsement first made known to him; but when sued by another and different party on another forged indorsement, he was relieved from liability, on the principle above stated. In this case, however, the forger was the confidential clerk of plaintiff, had charge of his bank book, made deposits and kept his cash and bank accounts; when plaintiff discovered the first forgery he used ambiguous language to the bank officer, continued the forger in the same confidential position, sanctioned the deposit made to meet the forged check, drew upon the surplus remaining after replacing the overdraft, and thus relieved the bank from the charge of

G. De Feriet v. Bank of America.

imprudence in paying a subsequent check similarly signed. Indeed, a careful examination of the evidence will leave a well founded doubt as to whether the bank was made aware that the check for \$2500 was actually a forgery until after the payment of the one for \$1700. The only direct evidence on this point is the statement of plaintiff himself, when called to the stand the second time, that upon returning said check to the bank clerk he remarked it had not been signed by him, and his first declaration, before going to the bank, that he had drawn no check that day. The officers of the bank may have inferred that, although not signed by the plaintiff himself, he did not consider it a forgery. Be this as it may, we are led to the conclusion that the peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depositary must take care to pay none but the checks or drafts of the depositor himself or his acknowledged special agent, and that this is a proper case to apply the equitable principle that where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other.

It is therefore ordered that the judgment appealed from be reversed, and that defendant recover of plaintiff the sum of \$1774 59, with legal interest from sixth January, 1868, and costs in both courts.

Rehearing refused.

No. 3194.—C. LANDRY, etc., v. M. LANDRY et als.

Notes that have been given by the different partners in settlement of a partnership, which have fallen into third hands after maturity, can only be enforced against the makers thereof to the extent to which each member be found to be indebted to the partnership. In such a case the third holders, after maturity, acquired no greater rights to the notes in their possession than the partnership itself would have had, had they remained in the possession of its agent for final settlement.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Talbot & Petit*, for plaintiffs and appellees. *William B. Robertson*, for intervenors and appellants.

HOWELL, J. An ordinary partnership for planting purposes was formed in 1852, to continue to the first of January, 1862, under the name of B. A. Landry & Co., not to be dissolved by the death of one or more members, and was composed of B. A. Landry, Caroline Landry, wife of D. Breaux, M. Landry, O. Landry, S. Landry, widow of J. A. Riviere, and D. Breaux. They held in common, as coproprietors, certain lands, slaves and movables, described and valued in the act of partnership. The proportion of each was fixed, and the managing agent, B. A. Landry, appointed therein. In December, 1858, five of the partners (B. A. Landry having died) had a settlement, appeared before a notary, acknowledged severally to be indebted to the firm in certain

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sums as advances, made their notes respectively for the amount so acknowledged by each, payable in all the month of March, 1862, after the date fixed for the expiration of the partnership, and to secure the payment thereof gave each a mortgage on their undivided individual interests in the lands and slaves. These notes were at the time delivered to M. Landry, who had been appointed the agent.

In April, 1867, the plaintiff, a maker of one of the notes, instituted this suit on them for the use and benefit, as alleged, of the firm. Pending the suit, after default but before answers were filed, the notes were seized, in April, 1868, under a garnishment process on an execution in the suit of *A. Mire v. B. A. Landry & Co.*; were bought at a sheriff's sale thereunder by the plaintiff in the writ; subsequently sold again at a probate sale and bought by one A. Levert, Jr., who intervened herein in April, 1869, to prosecute the suit to judgment, with recognition of mortgage in his favor as owner and holder of the notes against each maker. Defenses were here made by all the makers or their legal representatives, and also the representatives of the first deceased partner, B. A. Landry, that said notes were intended as mere acknowledgments of sums of money received by the partners, to be accounted for at the final liquidation of the partnership and partition of its assets; that this suit was instituted by C. Landry simply as a precaution to prevent the accruing of prescription, and not to enforce payment except in final settlement; that some of the makers are not indebted to, but creditors of the firm; that those who are debtors have withdrawn from the partnership more than their share, and have no interest subject to mortgage; and that a settlement and partition are necessary. They pray that the intervention of Levert, Jr., be dismissed, that an inventory and sale of the partnership property be made, and the parties referred to a notary for a final partition. To this demand for a partition the intervenor excepted. Several other suits against some of the partners and against the firm were consolidated with this, and all tried together. Pending the proceedings the property was sold by consent, and on the prayer of the intervenor, Levert, the proceeds held subject to the order of court. Judgment was rendered against the demand of said intervenor on the notes, but ordering him to be paid with preference the amount of two judgments held by him against the firm, and referring the other parties to a notary for a final partition. From this judgment A. Levert, Jr., appealed.

Under the circumstances the partners had the right to show how the notes originated, the object of making them, and that they did not owe the firm. The intervenor and his assignor or author acquired them long after maturity, and all the defenses could be made to them in his hands that could be in the hands of the payee or firm. He acquired no more rights than the partnership had, and it is fully shown

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that this was a mode adopted for conducting the partnership affairs in this respect, and the notes were held to be used only in a settlement among the partners, and the intervenor really acquired nothing by his purchase. Much of the litigation was useless, and some of it baseless, but we think the district judge has correctly solved the matters before him.

Judgment affirmed.

No. 2253.—BABBITT, GOODE & CO. v. THE SUN MUTUAL INSURANCE COMPANY.

The steambot Mars took on board at New Orleans, in 1861, a cargo of sugar consigned to Babbitt, Goode & Co., at Cincinnati, Ohio. The sugar was insured in favor of the consignees in the office of the Sun Mutual Insurance Company of New Orleans. When opposite the town of Helena, on the Mississippi river, the boat was fired at by a cannon shot and brought to the bank; a mob took possession of the boat and cargo of sugar, which became a total loss to the owners. The insurance company resist the payment of the policy on the grounds:

First—That the owners of the cargo not having made an abandonment and the cargo not having been an immediate total loss, they were not entitled to recover on that account. Held—That so far as the owners were concerned, from the moment the sugar was taken possession of by the mob, it became a total loss to them, and no act of abandonment on their part was necessary to entitle them to recover on the policy.

Second—That the taking of the sugar at Helena was a capture or detention by the enemies of the United States, and that such capture or detention was not among the perils insured against. Held—That it having been established by the testimony that the persons at Helena who took forcible possession of the sugar were not acting under any legally constituted authority of any State or government whatever, but were acting simply as a mob, the underwriters could not avail themselves of this defense to escape liability under this state of facts.

Third—That the underwriters were not liable because the taking of the sugar, under the circumstances, is not included in either the special or general words of the peril clause of the policy. The perils are as follows: "Of the rivers, fires, rovers, assailing thieves and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof by reason of the dangers of the river." Held—That the taking of the sugar by the mob at Helena was covered by the general terms of the peril clause in the policy; that while the mob at Helena could not properly be classed as assailing thieves, because the evidence did not establish that it was done *animo furandi*, yet the acts were of such a character that, if not reducible from the special words of the policy, they were clearly included within the general words at the end of the peril clause.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hornor & Benedict*, for plaintiffs and appellees. *J. A. Maybin, Leovy & Monroe*, for defendant and appellant.

Howe, J. Action upon a river policy of insurance on seventy-five hogsheads of sugar, at and from New Orleans to Cincinnati, on steamboat Mars, dated April 19, 1861. The answer admits the execution of the policy, denies that the plaintiffs owned or were interested in the property insured, and denied generally the liability of the defendant. There was judgment for plaintiffs, and defendant appealed.

First—The interest of plaintiffs in the goods covered by the policy is fully established and is not contested in this court.

Second—The liability of defendant is alleged to be for a total loss, under the following circumstances: On the twenty-fourth April, 1861, as the boat was passing the town of Helena, Arkansas, a mob of citizens fired a cannon across her bow, compelled her to land, took possession of her and her cargo and kept possession. The sugar of plaintiffs thus became a total loss.

The defendant contends that there has been no abandonment by plaintiffs, and that an abandonment within a reasonable time was essential to make the loss total. But we think that whatever may have been the exact nature of the seizure or taking of the goods by the mob, its effect was to cause the subject matter of the insurance to be totally lost to the owners. Twelve days after, the State of Arkansas seceded and at once became involved in the war of the rebellion. The plaintiffs, residing at Cincinnati, became cut off from all practical communication and lawful relation with both the defendant, in New Orleans, and the people of Helena, in Arkansas, and the sugar soon disappeared, either by theft or tortious conversion. In the spring of 1862 communication between Cincinnati and New Orleans became possible by the occupation of the latter place by the national forces; but communication between New Orleans and Arkansas was, for the same reason and at the same time, cut off. This suit was begun in February, 1864. An abandonment in the usual form would, at all times, have been an idle ceremony, of no benefit to defendant. *Mullett v. Shedden*, 13 East. 304; *Mellish v. Andrews*, 15 East. 13.

But, furthermore, the demand for payment as for a total loss made early in 1864 amounted to an abandonment (*Cassidy v. Louisiana Insurance Company*, 6 N. S. 422), and for all practical purposes was as useful to defendant as if made the moment New Orleans was reoccupied by the United States forces.

Third—The next defense urged is that the taking of the sugar was a capture or detention by enemies of the United States, and that such capture or detention not being a peril insured against, the defendant is not liable. We can not assent to this view. The persons in Helena by whom the sugar was seized, "some of it sold and some carried to Little Rock," are proved to have been citizens of the place, acting under no pretext of authority, but simply as a mob. It may be supposed, from the record, that they made the seizure because the vessel and cargo were believed by them to belong to persons in Cincinnati, but the reason of the outrage does not necessarily determine its character. The motive is one thing; the authority set up another. They neither represented nor claimed to represent any State or government, real or imaginary, actual or pretended. The cases of *Fifield v. Pennsylvania Insurance Company*, 47 Penn. 166; *Dole v. New England Insurance Company*, 6 Allen 373; and *Dole v. Merchants'*

Mutual Insurance Company, 51 Maine 465; and Mauraan v. Alliance Insurance Company, 6 Wallace 1, where the risk of capture was excepted and the taking by Confederate cruisers was held to be a capture, are, therefore, not in point. The case of Nesbitt v. Lushington, 4 Term 783, more nearly resembles this. There the vessel being forced by stress of weather into Elly Harbor, coast of Ireland, and there being a famine at the time, the people came on board and took control of the ship from the captain and crew by violence, and weighed her anchor, by which she drove on a reef of rocks and was stranded. They compelled the captain to sell the corn on board at three-fourths its invoice price, except ten tons lost by stranding. Lord Kenyon said that the case did not fall within the meaning of "arrests, restraints and detentions of kings, princes and people;" that "people" meant "the ruling power of the country," which this mob was not. Mr. Justice Buller was of the same opinion and seems to have considered the acts of the mob as "wrongful acts of individuals," which are usually described as perils of "pirates, rogues and thieves."

Fourth—It is contended by the defendant, lastly, that it can not be held liable because the taking is not included in either the special or general words of the peril clause of the policy. The perils are as follows: "Of the rivers, fires, rovers, assailing thieves, and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof by reason of the dangers of the river."

The judge *a quo* thought that this mob of citizens were assailing thieves, but we may doubt the safety of such a conclusion, for it is not clear that they took the property *animo furandi*. But their acts may still fall under the general words of the peril clause. It is well settled that these general words do not extend the scope of the policy so as to include perils beyond and entirely different from those specially enumerated. But it is equally well settled that it has some effect in embracing risks of a character similar to those specially insured against *ejusdem generis*.

But the defendant urges that the last words of the general clause, "by reason of the dangers of the river," restrain its operation to one alone of the previously enumerated risks, namely, perils "of the rivers." This, in effect, is to say that the defendant insured against "the perils of the rivers *and all other* perils of the river," for that is what the general clause, thus interpreted, amounts to in brief. Such a construction does not seem reasonable or necessary. On the contrary, it would seem the defendant intended by its language to say that it took certain risks and all others *ejusdem generis* that might occur during the navigation of the river from New Orleans to Cincinnati.

Babbitt, Goode & Co. v. The Sun Mutual Insurance Company.

It remains, therefore, to inquire if the acts in question, though not done *animo furandi*, were *ejusdem generis* with those specially insured against, viz: the acts of "rovers and assailing thieves."

In *Naylor v. Palmer*, 8 Exchequer 750, where the passengers, who were coolies, rose upon the crew and with violence seized the vessel, the court, Chief Baron Pollock, said: "The act of seizure of the ship and taking it out of the possession of the master and crew, by the passengers, was either an act of piracy and theft, and so within the express words of the policy, or, if not of that quality because it was not done *animo furandi*, it was a seizure *ejusdem generis* analogous to it or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy." This case having been taken up to the Exchequer Chamber, was affirmed, the court, Coleridge, B., saying that the acts of the passengers were "either direct acts of piracy or acts so entirely *ejusdem generis* that if not reducible to the special words of the policy, they were clearly included within the general words at the end of the peril clause."

Similar language may be applied in this case to the acts which caused the total loss to the plaintiffs of their goods. They may not be the acts of "rovers and assailing thieves," for these imply the *animus furandi*, but the taking was *ejusdem generis*; it was without any pretense of sanction by even a pretended authority, and the evidence shows it was accompanied with acts of robbery, the bar of the boat being not unnaturally a special object of plunder. We conclude, therefore, that this taking was a peril included in the general words at the close of the peril clause, and that there is no error in the judgment.

Judgment affirmed.

Rehearing refused.

No. 3201.—A. BARTELL v. J. G. LALLANDE.

The obligations between employer and laborer on a plantation are reciprocal. If the employer discharge the laborer before the time of his engagement has expired, without any just cause, he at once incurs the liability of paying the laborer for the whole time of his engagement. On the contrary, if the laborer leaves his employer before the time of his engagement has expired, without any just cause, he thereby forfeits all the wages that may be due him, and contracts the obligation to return all moneys that he may have received from his employer on account of such employment. Therefore, if the evidence shows that the laborer left his employer without any just cause before the time of his engagement had expired, he can not recover from the employer any wages for the time he has served.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborne, J. O. F. Dranguet*, for plaintiff and appellee. *Pierson & Levy*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWELL, J. Plaintiff claims \$550 as the value of his share of the crop of 1869 and \$300 damages, on the allegation that he was dis-

charged without cause by defendant, the proprietor and employer. The defense is that plaintiff abandoned the crop without the consent and against the remonstrances of defendant, by which he put an end to the contract and forfeited his rights to any interest or part therein, which defendant informed him would be the result of his so leaving, and that defendant was thereby damaged to the amount of \$300. Plaintiff obtained a verdict and judgment for \$436 17, and defendant appealed.

It is shown that in May, 1869, when seven laborers previously employed by defendant left, the plaintiff undertook, with one other, to cultivate, gather and save the crop for one-third in kind (one-sixth to plaintiff), when the corn was gathered and the cotton baled for market, the defendant to furnish supplies, etc.; that in August plaintiff left, as he professed, for a week to visit his children, when the crop needed his attention and labor, and notwithstanding the objections and remonstrances of defendant, and being told expressly if he left he would lose his rights to the crops; that at the expiration of about sixteen days, and after defendant had hired other laborers, plaintiff returned and offered to resume work and complete his contract, to which defendant objected, and upon the former's persisting in working on the place, the latter had him taken before a justice of the peace, who ordered that he should leave the place.

Under these circumstances there was no just cause for the plaintiff's leaving, and he certainly put an end to the agreement, and it rested with the defendant whether he would renew it or not.

Art. 2750 [2721] C. C. provides, if "a laborer, after having hired out his services, should leave his employer before the time of his engagement has expired, without any just cause of complaint against the employer, the laborer shall thereby forfeit all the wages that may be due to him, and shall moreover be compelled to repay all the money he has received, either as due for his wages or in advance thereof on the running year, or on the time of his engagement." The two preceding articles make the obligations and rights of laborers on plantations and in manufactures and their employers reciprocal. The law recognizes no difference between them. Laborers are as fully and stringently bound by the terms and obligations of their contracts as their employers are, and when they violate them they must bear the legal consequences. The great importance of the agricultural interests of this country demand that these rules of law and justice, as well as others, be maintained in all their vigor and integrity.

The defendant is entitled to no damages in this case.

It is therefore ordered that the judgment of the lower court and verdict of the jury be set aside and annulled, and that there be judgment in favor of defendant, with costs in both courts.

Bird v. Duralde, Sheriff, et als.

No. 3249.—ARTEMISE E. BIRD v. J. V. DURALDE, Sheriff, et als.

In a suit by the wife who has been separated in property from her husband and authorized to administer her own affairs, by way of third opposition against the creditors of her husband, who have seized the crop as the property of her husband, it is incumbent upon her to establish the validity of her judgment of separation. If she show, in answer to the objection that her judgment is invalid because her husband was solvent and had ample means to satisfy her demands after paying all his liabilities at the time her suit was brought, that his affairs were in a disordered and embarrassed condition, and that, after paying his debts he would have nothing left with which to satisfy her claims, then she will be held to have had the right to institute and prosecute her suit for a separation of property. If she show, in answer to the objection that her judgment of separation is null because she has not made proper efforts to enforce it, that she has caused repeated executions to issue thereon, and has realized but a small portion thereof, which has been credited on the judgment, that in addition to her proceedings by execution, she has taken in part payment, at a fair price, certain lots of ground belonging to her husband, which have also been credited on the judgment, then she will be held to have made proper efforts to enforce payment, and her judgment of separation of property will not be held to be void on that account.

The wife having established the validity of her claim, her right to institute and prosecute her suit for a separation, and having shown that she has made every possible effort to enforce her judgment, and having shown also that a large portion of the real estate belonged to and constituted her separate estate before her marriage, she must be held to be entitled to administer it, and to enjoy in her own right the crops made after the rendition of her judgment of separation of property from her husband.

A PPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Posey, J. Samuel P. Greves and A. S. Herron*, for plaintiff and appellee. *White & Robertson, Barrow & Pope and Fuqua & Callihan*, for defendants and appellants.

TALIAFERRO, J. This controversy is between a wife alleging she is separate in property, and the creditors of her husband. The wife, who is the plaintiff in this suit, instituted this proceeding by way of third opposition, claiming the proceeds of a crop of sugar raised in the year 1869, chiefly, as she alleges, on her own plantation, but partly on that of her husband; the said crop of sugar and the molasses, the product of her cultivation for the year 1869 having been seized under executions issued under judgments of various creditors of her husband and advertised for sale by the sheriff. She shows that by judgment of a competent court, rendered on the twentieth of July, 1866, she was decreed to be separate in property from her husband and authorized to administer her separate estate. She alleges that by the authorization so decreed she has continued to administer her separate property independently of her husband, and in so administering it, she has carried on the cultivation of her plantation in her own interest and for her separate use and benefit.

During the month of December, 1869, executions were issued in four several cases on judgments of the creditors against Thompson W. Bird, the plaintiff's husband, and all his real estate, consisting of his one-third interest in the "Hollywood Plantation," the Bellevue Place, several detached parcels of land, mules, stock, farming utensils, etc., were seized and sold on the fifth of March, 1870, on a credit of twelve

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months, the proceeds amounting to \$36,095, for which bonds were taken from the various purchasers according to law. Previous to the sale, an execution was issued on the wife's judgment, and the same property was seized. The property, it seems, brought an amount exceeding that of the prior mortgages. The sugar crop of 1869 and the molasses were sold by consent, and the money held subject to the decision of the suit.

The proceeds of the sale of the real estate over and above the amount of the prior mortgages and those of the sugar and molasses form the subject of the contest. The wife claims the latter as owner, the former by her tacit and judicial mortgage. The creditors oppose her claims, alleging the illegality of her judgment on various grounds, and they contend that the crop of 1869 seized under execution was the property of her husband or of the community and subject to the payment of his debts.

Judgment was rendered in favor of the plaintiff; her judgment of separation of property was held to be valid, and she was decreed to be the owner of the crop of 1869, and entitled to its proceeds. The judgment of 1866, dissolving the community of acquets and gains, awarded the wife the sum of \$3550 24 on account of paraphernal funds received by the husband, and recognized a legal tacit mortgage against her husband to date and take effect from the year 1837 for a part, from subsequent dates for other portions, the latest from February, 1856. Several credits on this judgment being deducted, there was a balance due at the rendition of judgment in the present suit of \$1694 33, which the court ordered to be paid by priority out of the proceeds of the real estate, and directed the remainder to be distributed among the other creditors, according to law. From this judgment the creditors appealed.

The grounds taken by the appellants in attacking collaterally the judgment of the plaintiff against her husband are: That the insolvency of the husband is not shown; that having failed to prosecute her judgment as required by law, the judgment itself became null, and as a consequence the community existing between herself and husband was not dissolved; that the proceeds of the crop of 1869 do not, therefore, belong to the plaintiff as her paraphernal means, as she pretends, but are subject to be applied to the payment of the debts of the husband.

After some pains taken in the examination of the large record brought up in this case, we come to the conclusion that at the time of the institution of the plaintiff's suit for a separation of property Thompson W. Bird was in embarrassed circumstances. The counsel of the appellants have labored assiduously to show the contrary, but we think unsuccessfully. Upon the basis of the first estimate presented, an

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error has crept into the array of assets, we apprehend, by giving the amount of value of property assessed to Bird in 1866, and besides his interest in the Hollywood estate; the latter, we imagine, being included among the assessed property estimated at \$32,890. The value of his interest in Hollywood being put at \$8333, this sum should not appear as an asset if it be embraced in the assessment. If so, the amount of liabilities preponderates. The second tableau is not more satisfactory. Resort is had to doubling the value of the Hollywood plantation, making it worth \$50,000, whereas in the first estimate it was taken at \$25,000, the value as shown by the evidence in this case; to setting down as an asset a mortgage to Bird by Mrs. Daigle for \$27,150, and adding \$6698, amount brought out by the first calculation as what Bird is worth over and above his debts. The aggregate in the second estimate making him worth, above all his liabilities, \$42,181, a sum sufficient to cover all the debts of the complaining creditors, the balance due on the wife's judgment, and to leave no inconsiderable sum besides. The Daigle mortgage is not explained; it is not shown that the notes upon which it is predicated are held by Bird or not, or whether they are worth anything or not if he be the holder. For aught that appears, they may have all been paid. The introduction of this mortgage and the \$50,000 valuation of Hollywood in evidence as showing ownership of property in Bird, was objected to, and the court below refused to admit it, on the ground that it was offered after testimony had already been taken on both sides of the question relating to the indebtedness of Bird and his means of discharging it; that the same was offered at an improper time and out of the regular order of taking testimony, and was calculated to take the plaintiff off her guard and by surprise. A bill of exceptions was taken by the defendants.

We deem it unnecessary to decide upon the bill of exceptions, as the testimony, had it been admitted, would be contradictory in part, and, upon the whole, vague and unreliable for the purpose for which it was sought to be used.

The \$40,000 of assets in the hands of the attorney, Greves, of which one-half, it is said, belonged to Bird, consisted of notes and uncollected debts due the estate of Abraham Bird, whose executor, it seems, Thompson W. Bird was. These were to a large extent worthless, and the evidence does not warrant the conclusion that Thompson Bird's interest in them was worth more than the amount which the attorney paid over to him, which was about five or six thousand dollars in all. All estimates of the character of those made by the defendants as to the value of the property of Bird, are indefinite and unsatisfactory. The evidence satisfies us that the situation of the affairs of the husband in this case were such as authorized the wife, by article 2425 of the

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Civil Code, to petition against her husband for a separation of property. That the plaintiff's claims against her husband were well founded, seem not to have been earnestly controverted. They are fully established. It is shown that a large portion of the land embracing the Esnard Plantation is her separate property.

The defendants contend that the judgment of the plaintiff and opponent is null on the ground that it was not enforced in the manner contemplated by law by a continuous effort to realize its amount out of the property of her husband. We find that the wife's judgment was obtained on the twentieth of July, 1866; an execution was issued on the tenth of August following; property was seized and sold the sixth of October, and \$597 30 were made and credited on the judgment. On the eleventh September, 1866, another execution issued, under which certain judgments were seized, but we find nothing in the record showing that anything was made by this seizure. On the twenty-ninth of December, 1869, a *fiery facias* issued, and it seems that the further sum of \$324 79 was made under this seizure and credited upon the judgment. Afterwards the further sum of \$1500 was credited upon the judgment in consideration of the transfer by the husband of certain lots of ground at East Pascagoula. The interval between the issuing of the first and last execution, a period of about three years, the defendant argues was a delay fatal to the validity of the judgment, and cites the case of *Bertre v. Walker, sheriff, et al.*, 1 Rob. 432. But in that case no execution issued on the wife's judgment until twelve months had elapsed from the rendition of the judgment, and no effort of any kind had been used to realize its amount. No payment had been made upon it.

We think that a sufficient diligence is shown in this case in the prosecution of the plaintiff's judgment. Besides the property seized, there was no other personal property of the husband that could be reached. The interval of non-action worked no injury to the defendants. The records show that they lay dormant two or three years after the rendition of the wife's judgment and failed to seize any of their debtor's property; that they waited until the third crop made by Mrs. Bird was ready for sale, the first one perhaps that was worth seizing, as the only available source from which they expected anything. Bird's real estate was under heavy mortgages, which, perhaps, presented a barrier insurmountable to these defendants. They might have interposed in regard to the personal property seized by the wife and raised the issue long before as to the validity of her judgment, but this was not done.

Lastly, it is urged by the defendants that the cultivation of the plantation, though nominally carried on in the name of Mrs. Bird, is really conducted by the husband for his own use and benefit.

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They assert that the Esnard and Bellevue plantations, with all the mules and farming utensils, belonged to Bird, and contend that the wife could not cultivate those plantations on her own account. The evidence, as we understand, is, that what is called the Esnard plantation is the separate property of the plaintiff; that her principal cultivation was carried on upon that plantation; that she also had a part of the Bellevue plantation in cultivation in the years 1868 and 1869, and that the greater part of the sugar crop of 1869 was grown upon the Esnard plantation. No effort was made by the defendants to show what portion of that crop was raised on the land of the husband. They treat it as entirely the property of the husband. The question raised on this branch of the contest is, did the fact of the wife's cultivation in 1869 of a part of her husband's plantation, in addition to that of her own, vitiate and render null her judgment authorizing her to administer her own affairs. Under all the facts of the case we think it did not. It is proved that the management of the plantation was under her control. It is shown that she made the contracts with the laborers and that the transactions with the commission merchant were carried on in her name through the agency of her husband, acting under a power of attorney from her.

We conclude that the judgment of the court *a qua* was properly rendered and should be maintained. The claims of the wife are clearly *bona fide*. The embarrassed state of the husband's affairs authorized her judgment of separation of property; she has shown sufficient diligence in the prosecution of her judgment, and that she has assumed under that judgment the administration of her separate estate.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 3202.—E. S. DANCY, Wife, etc., v. MARTIN, COBB & Co.

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A confession of judgment by the wife on obligations which she has given jointly or *in solido* with her husband, in liquidation and settlement of the debts of the husband, is not binding on the wife. On the trial of a suit by the wife to annul a judgment which has been confessed by her, *in solido* with her husband, if the evidence shows that the parties were not separated in property, and that the husband was administering the estate of the wife as well as that of the community, and that the debts for which the wife confessed judgment *in solido* with her husband did not enure to her benefit or to the benefit of her separate estate, such judgment will be declared null and of no effect as against the wife.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & T. P. Farrar*, for plaintiffs and appellees. *Sparrow & Montgomery*, for defendants and appellants.

HOWELL, J. These are proceedings by a married woman to enjoin

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and annul two judgments rendered on twenty-eighth October, 1861, upon confessions in the cases of Martin, Cobb & Co. v. D. M. Dancy et als., and Cobb, Manlove & Co. v. De Moss et als., and the main question involved is whether or not the plaintiff was liable for the debts which were the basis of said judgments.

It seems that in the latter part of 1845, William C. De Moss died in Madison parish, leaving five children and a large plantation, over one hundred slaves and other property in said parish, inventoried at over \$82,000, and considerable property in Mississippi; that in March, 1846, David M. Dancy, a son-in-law of the deceased and husband of the plaintiff, was appointed curator of the succession; that in September, 1849, said Dancy was appointed tutor of three of the De Moss children, then minors; that the said plantation, called the "Crescent Plantation," was very productive and well managed, the crops from 1845 to 1862, except two years of overflow, averaging from 600 to 800 bales, the revenues largely exceeding the plantation expenses, which are estimated by witnesses at from \$5000 to \$10,000 per annum; that in March, 1858, three of the parties interested in said property, to wit: D. M. Dancy, his wife E. S. Dancy, authorized by her husband, and Vannerson De Moss, who was one of the three minors above referred to, acknowledged themselves indebted to Martin, Cobb & Co., merchants in New Orleans, in the sum of \$33,490 26, evidenced as described in act of mortgage, by three notes of \$8331 87 each, dated on twenty-eighth February, first March and second March, 1858, payable one day after date to the order of, and indorsed by themselves, and by a draft drawn by said D. M. Dancy for \$7213 64 on and accepted by G. M. Pinckard & Co., and protested on twentieth December, 1857, and to secure the payment of the same and all advances in cash and supplies to be made to said Dancy and De Moss, the said three parties mortgaged "an undivided three-fifths interest in and to" the said Crescent plantation, on which the parties resided, and some eighty-two slaves thereon; that in April following the same parties acknowledged an indebtedness to G. M. Pinckard & Co., merchants in New Orleans, of \$46,475, evidenced by fourteen notes for different amounts, dated sixteenth March, 1858, payable to the order of D. M. Dancy, some at eleven, some at twelve and some at thirteen months from date, and to secure their payment executed a mortgage upon "an undivided three-fifths interest in and to" the same property; that on twenty-eighth October, 1861, Martin, Cobb & Co. filed a suit against the said parties, D. M. Dancy, his wife and Vannerson De Moss, on the three notes and draft described in the first act of mortgage, and two other claims, one described as a note for \$5507 11 for plantation advances, and the other as a balance of an account current rendered twenty-second March, 1859, by G. M. Pinckard & Co., and by them transferred to the

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plaintiffs, who asked for recognition of mortgage as made in both the above mentioned acts of mortgage, and upon producing the confession of the said defendants (the wife being authorized by the husband) on the four notes and the account, amounting to \$34,626 60 (omitting the draft for \$7213 64), and filing *eight* notes different from those described in the petition, *five* only of which being signed by Mrs. Dancy, they obtained judgment *in solido* against the three defendants on all the claims described in their petition, and amounting to \$41,840 25; that on the same day Cobb, Manlove & Co., merchants in Vicksburg, Miss., sued D. M. Dancy, his wife, Vannerson De Moss, Alice De Moss, wife of J. L. Lum, and David De Moss (the three last being those to whom D. M. Dancy was appointed tutor in 1849) for \$7219 66, amount of account current rendered them, it is alleged, as the owners of the Crescent plantation for plantation and family supplies to sixth April, 1861, and upon producing the confession of the said defendants (the wife being here also authorized by the husband) and filing an account made out in the name of "Dancy & De Moss" for said amount, consisting of charges for commissions for indorsing and advancing payment of and interest on two notes, they obtained a judgment *in solido* against the defendants for the amount thereof.

It is the execution of these two judgments, now owned by T. J. Martin, which Mrs. Dancy enjoins, in January, 1870, and their nullity she seeks as to herself, and her interest in the property held in common with her coproprietors and codefendants, on the grounds that they were rendered on obligations contracted by her husband, for which she was in no manner bound in law, and which did not inure to her benefit or that of her separate property; that the confessions of judgment are mere contracts, which she signed in error and in ignorance of her rights and under marital influence, and that the said confessions and the acts of mortgage are contracts prohibited and null as regards herself.

It is very clear that a wife can not bind herself nor be held bound for a debt of her husband, and the inquiry arises in this case, were these debts the debts of the husband or of the wife? There was at the time no separation of property between Dancy and his wife, and it is not shown that she had the separate administration of her paraphernal property. On the contrary, her husband was administering and managing it himself, and all the fruits and revenues thereof belonged to the community, and all the debts contracted by him were community debts, as between him and his wife, for which she was not liable, nor was her separate property liable for them. The plantation and slaves, inherited from their parents, belonged to Mrs. Dancy and her coheirs, but the administration of her portion was under the control of her husband, and in conducting the plantation with the other

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heirs, the husband or the community, and not the wife, was their partner in the planting partnership, so far as the questions raised in this record are concerned.

We conclude, with the district judge, that Mrs. Dancy is not liable under the judgments enjoined. We think, also, he did not err in restricting the injunction to one-fifth. The evidence is not satisfactory that Mrs. Dancy is the owner of her sister's (Mrs. Waddill) interest. Admit that the description of the land is correct, Mrs. Dancy was not authorized by her husband or the judge to make the purchase. And, besides, having just been relieved in this proceeding from liability because she was not administering her separate property, it would be inconsistent to declare this purchase to be her separate property, and not that of the community. Whatever is purchased during the existence of the community, whether in the name of the wife or husband, is presumed to belong to the community.

Judgment affirmed.

No. 2956.—STATE OF LOUISIANA v. J. J. McCORT.

In a criminal case, the objection that there was no order of the court authorizing the filing of the information comes too late if only made for the first time in the Supreme Court.

The jury, finding the greater offense charged in the indictment was not committed by the accused, have the right to modify their finding so as to bring in a verdict of guilty of the lesser offense charged.

The revisory legislation of April, 1870, did not repeal, but continued in force all laws which were in existence before, and was continued in the revised act. *State v. Brewer*, 22 An. 273. Therefore, if an offense had been committed against the law as it stood before the passage of the revisory legislation, but which was not punished until after it passed, and the statute thus violated had been re-enacted in the revisory legislation of 1870, such offense is still punishable, notwithstanding the repealing clause of the revisory act of April, 1870, repeals all laws not contained therein except such as are specially excepted.

Although the general rule is well settled that the right of the accused to be heard by counsel is entitled to the largest latitude, yet, if the question which the judge *a quo* refuses the counsel of the accused to urge before the jury is one of law alone, which can not prejudice the rights of the accused, whether it be determined one way or the other, then and in such case a new trial will not be granted because the counsel was refused permission by the judge *a quo* to argue the point to the jury.

A PPEAL from the First District Court, parish of Orleans. *Abell, J. Simeon Belden*, Attorney General, for the State. *J. J. Foley*, for defendant and appellant.

HOWE, J. The prisoner having been convicted of "entering a dwelling house in the night time without breaking and with intent to steal, and of larceny," and sentenced to imprisonment at hard labor, has appealed. He makes four points in this court:

First—That there was no order of the court authorizing the filing of the information. This objection, made here for the first time, comes too late.

Second—That the verdict of the jury is not responsive to the charge

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49	1338

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as set forth in the information. The charge was "breaking and entering a dwelling house in the night time with intent to steal, and larceny." The jury, finding that there was no breaking, had a right to find the verdict they did. The lesser offense was necessarily included in the circumference of the greater one of the same character. 6 An. 286.

Third—That the law on which the prosecution was based and under which the defendant was sentenced had not then been promulgated (July, 1870). The law had been in force several years prior to that time, and in the case of *State v. Brewer*, 22 An. 273, we had occasion to decide that the revisory legislation of April, 1870, did not repeal, but continued it in force.

Fourth—That the judge *a quo* erred in refusing to permit the counsel of the accused to argue this question of promulgation to the jury. As a general rule, we would be slow to sanction any limitation of the right of the accused to be heard by counsel. But in this case, the point which the counsel desired to argue was so clearly outside the facts and the law of the case that we can not believe the action of the district judge constitutes a sufficient reason for a new trial. There was no error to the prejudice of the accused. It was immaterial whether the revisory legislation of 1870 had been promulgated or not.

Judgment affirmed.

No. 3167.—*SATTERFIELD v. SPURLOCK, SPURLOCK v. SATTERFIELD, and SATTERFIELD v. SPURLOCK, (Consolidated)*

The decision of this case involves only questions of fact as to the relative proportion of the claims which had for their consideration the sale of slaves and the sale of land and personal property. The principles on which the present decree is based were settled in the decision of the same case, reported in 21 An. page 771, viz: That obligations having for their consideration the sale of land and slaves could only be enforced to the extent of the ascertained value of the land at the time of the sale.

A PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Miller, J. S. R. Thorpe*, for plaintiff and appellant. *E. North Cullem*, for defendant and appellee.

WYLY, J. These consolidated cases were before this court in December, 1869, and the decision is reported in 21 An. 771, to which reference is made for a statement of the facts and issues presented for adjudication.

After disposing of various issues the cause was "remanded to ascertain the relative amount of the slave and other considerations in the remaining notes of Spurlock, filed in this cause by Satterfield, with instruction that no judgment can be rendered by the court of the first instance for the slave part of the consideration of said remaining notes."

At the trial on the remandment the district judge came to the conclusion, from the evidence, that the slave part of the notes declared on by Satterfield was sixty per cent. and the valid part, to wit: the part for land and movables, was forty per cent., and on this basis he determined the rights of Satterfield; he, however, compensated the claim of Satterfield by large sums or credits, which he ascertained to be due Spurlock, and finally gave judgment in favor of the latter against the former for \$2170 85 and costs.

From this judgment Satterfield appealed.

There is a wide difference in the opinions of the witnesses of Satterfield and the witnesses of Spurlock as to the relative amount of the slave and other considerations of the notes.

After mature consideration we have come to the conclusion that the apportionment fixed by the district judge is not correct. We think fifty per cent. is a proper estimate of the slave consideration in the notes, and fix the apportionment at that rate.

Satterfield should, therefore, have judgment against Spurlock for half the amount of the notes sued on, after deducting \$37,385, the amount of the credit arising from the giving in payment of the twelfth of April, 1865, which sum was by the parties imputed to the third note and the balance to the other notes next in order owned by Satterfield.

The third note, due the eighteenth of May, 1861, amounted to \$21,726 72, principal and interest up to the twelfth of April, 1865, the time at which the credit arose from the act of giving in payment, and this note was discharged by the imputation of the parties out of said credit of \$37,385, and the balance of said credit, to wit: \$15,658 28, must be applied to the note next in order held by Satterfield, which is the fifth note, due the eighteenth of May, 1863, and amounting, principal and interest up to the twelfth of April, 1865, the day of the credit, to \$19,077 12, from which, after deducting the said credit, there remains an unpaid balance of \$3418 84, to be apportioned according to the estimate we have made of the slave and other considerations of said fifth note.

The sixth, seventh, eighth, ninth and tenth notes each amount to \$16,560, of which we estimate the valid part to be one-half of each note, to wit: \$8280. On our apportionment we think Satterfield should have judgment against Spurlock for \$43,109 42, with eight per cent. per annum interest on the valid part of each note from its maturity, except on the balance due on the fifth note, on which the interest should be counted from the twelfth of April, 1865.

As to the other credits allowed Spurlock by the district judge we think they should not be allowed, and that the bills of exceptions taken by Satterfield to the introduction of proof to establish them,

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was well taken. The court permitted Spurlock to prove credits that he had not claimed in his pleadings, and which, if they exist, have arisen since the date of the judgment of the thirty-first of October, 1866, from which the devolutive appeal was taken. On the remandment the pleadings were not amended, and the only issue before the court was to ascertain the slave and other consideration of the notes sued on by Satterfield, and after making the apportionment to give him judgment for the valid part of said notes, after allowing the credit arising from the act of giving in payment of the twelfth of April, 1865. Whatever rights or credits Spurlock may have or be entitled to by virtue of the execution of the judgment of the thirty-first of October, 1866, by Satterfield, pending the devolutive appeal, he may assert in an action hereafter and his right to do so is reserved in this decree.

It is therefore ordered that Edward H. Satterfield have judgment against Thomas J. Spurlock for the sum of forty-three thousand one hundred and nine dollars and forty-two cents (\$43,109 42), with eight per cent. per annum interest on \$1709 42 thereof from the twelfth of April, 1865; with like interest on \$8280 thereof from the eighteenth of May, 1864; on \$8280 thereof from eighteenth of May, 1865; on \$8280 thereof from the eighteenth of May, 1866; on \$8280 thereof from the eighteenth of May, 1867; and like interest on \$8280 thereof from the eighteenth of May, 1868.

It is further ordered that the mortgage given by Spurlock to Satterfield on the eighth day of October, 1857, to secure the said debt be recognized and rendered executory on all the property described in said act of mortgage, except the slaves; also, that the vendor's privilege thereon to be recognized and enforced.

It is further ordered that said Spurlock pay costs of both courts

No. 3235.—H. B. BENJAMIN v. PARISH OF EAST BATON ROUGE.

The proceeding authorized by act No. 69, of 1869, against a parish, to compel the properly constituted authorities to levy and collect a tax to pay for work that has been done for the parish, under contract with the police jury, is a proceeding in the nature of a mandamus to compel the officers of the parish to do what is required of them by law. The statute does not impose upon the court the burden of levying a tax, but simply authorizes it to render judgment for the amount found to be due, and to order the proper authorities to levy and collect the tax necessary for its payment. The act is not therefore obnoxious to the provisions of the Constitution on the subject of taxation.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Fuqua & Callihan*, for plaintiff and appellant. *J. W. Burgess* and *A. S. Herron*, for defendant and appellee.

HOWELL, J. Plaintiff sues upon several warrants issued to him for the erection of a bridge in the parish under contract, and drawn upon

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the "bridge fund," and he asks the court to order the assessor and collector to assess and collect a tax sufficient to pay his claim and costs, under the provisions of act No. 69, of 1869, re-enacted in the Revised States, 1870, articles 2628, 2629 and 2630.

The defense is that said act sixty-nine is unconstitutional, as by the Constitution only the Legislature and police jury can levy and collect taxes; that by act of 1868, page 175, the parish could only levy a tax of three-quarters of one per cent., which had already been levied, and that the "plaintiff took the warrants sued upon at the rate of fifty cents on the dollar for work done, which warrants so issued were to be in full for said work at the depreciated value thereof, the consideration being for work done, and valued by contract at \$300 in currency and \$600 in parish warrants as currency in this particular case."

Judgment of nonsuit was rendered and plaintiff appealed.

It seems to us the judge erred. The right or authority to issue the warrants in question is not denied, and it is shown plaintiff did the work in pursuance of a contract made under a resolution of the police jury; that it was accepted by the parish, the warrants given, and that the police jury made an appropriation of a sum sufficient to pay for the proposed work, which appropriation, it is admitted, was included in the assessment for the year and the tax in process of collection at the time of filing the defense in the court below. No legal excuse is shown for not paying the warrants in the hands of the plaintiff or other person. It is a matter of no concern to the parish who receives the money, if it is liable for their payment, and it can not be seriously contended that the giving of the warrants extinguished the obligation of the parish to pay the amount for which they were issued. The parish which issued the paper is in a very different position from a third person who may have given its warrants in payment for work done for said third person. The parish is clearly bound to pay the face of the warrants, whether held by the payee or his assignee. And if the funds provided by the police jury for such payment have been misapplied or not collected, the holder is entitled to the remedy provided by act No. 69 of 1869, or articles 2628 to 2630 Revised Statutes, which we can not say is clearly in conflict with the Constitution. The court does not, under this law, assess a tax, but renders a judgment for money against the parish, and directs the proper officer or officers to whom the Legislature delegated the power, "forthwith to assess a parish tax at a sufficient rate per cent. upon the assessment roll of the current year to pay and satisfy said judgment with interest and costs." This is in the nature of a mandamus. See 11 An. 672.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of the parish of East Baton Rouge the sum of \$600, with legal interest from judicial demand, and costs in both

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courts; and it is further ordered that the Board of Assessors for said parish, composed of the clerk, recorder and sheriff, proceed forthwith to assess a parish tax at a sufficient rate per cent. upon the assessment roll of the current year to pay and satisfy this judgment, interest and costs, and that so soon as the said tax is so levied, the tax collector of said parish shall proceed at once to collect the same, in the manner in which parish taxes are now collected, which shall constitute a special fund out of which the judgment, interest and costs shall be paid.

No. 3236.—ELIZABETH BARBEE v. S. B. PERKINS et al.

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A sale of real property belonging to a succession, under a decree of a competent court, will not be held to be an absolute nullity on account of irregularities in the mortuary proceedings which lead to the granting the order. In such a case the claimant under an adverse title must first cause the sale to be annulled by direct action. 19 An. 353.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Fuqua & Callihan*, for plaintiff and appellant. *White & Robertson* and *A. S. Herron*, for defendants and appellees.

HOWELL, J. This is a petitory action, in which plaintiff asks to be declared the owner and put in possession of a tract of land in the parish of East Baton Rouge, and in the possession of the defendants, on the ground that she inherited the same as sole heir of her mother, Mrs. Henderson, who died in 1854, in West Baton Rouge, where her succession was opened, as alleged, by the appointment of plaintiff's father, J. G. Henderson, as her tutor, who, in such capacity, took possession of all her mother's property, including the land in question, and has since illegally and by a fraudulent combination with defendants disposed of the same by means of certain void judicial proceedings, resulting in a sale, which she describes but does not ask to be set aside.

The defendants set up title by purchase at sheriff's sale, made in October, 1861, in pursuance of a decree of the district court of West Baton Rouge, having jurisdiction of the succession, granted upon the advice of a family meeting held in St. Landry, where the tutor and minor resided at the time, and a commission to the sheriff of East Baton Rouge, issued under said decree. They also plead the prescription of five years to any alleged irregularities prior and subsequent to the date of said decree.

The evidence shows that the sale was made as a succession sale, under an order of the district court of West Baton Rouge, where the succession of Mrs. Henderson was opened; that S. B. Perkins, one of the defendants, was the adjudicatee, who complied with the terms of sale by giving his note, due at twelve months, for the price, which was delivered to the tutor, on whose petition the sale was ordered, and

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who on the same day purchased another tract of land from said Perkins, and gave up said note in payment of the price.

The record discloses many censurable irregularities in the mortuary proceedings; but we are not authorized, in consequence thereof, to treat the decree of a competent court and the sale under it as absolute nullities, and declare the plaintiff to be the owner of the land bought by Perkins in apparent good faith. Until the judicial sale is set aside, we must give effect to it and the proceedings sustaining it. 13 La. 431; 10 R. 396; 2 An. 467; 19 An. 354. This not being a suit to annul the judgment and sale under it, it is unnecessary to inquire into the effect upon the sale of the disposition made by the tutor of the note received by him from Perkins, the purchaser. The tutor may have made himself liable to plaintiff by such transaction, but it does not render the sale null.

Judgment affirmed.

No. 1335.—P. DUCLOS & Co. v. CITIZENS' MUTUAL INSURANCE COMPANY.

The policy of insurance contained a stipulation as follows: "In case the insured shall have already any other insurance against loss by fire on the property insured, not notified to this corporation and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect." And the insured takes out a second policy in another company on the same piece of property, without giving notice in the manner indicated in the first policy. Hold—That by his failure to give notice, as stipulated in the first policy of the second insurance, he forfeited his right to recover on the first policy, the property insured having been destroyed by fire.

APPEAL from the Third District Court, parish of Orleans. *Fellows, J. O. Roselius* and *Alf. Philips*, for plaintiffs and appellees. *Carleton Hunt* and *L. Castera*, for defendants and appellants.

This case was tried by a jury in the court below.

TALIAFERRO, J. The plaintiffs sue on a policy of insurance to recover from the defendants \$8,958 12, the proportional amount claimed to be due by the company under the policy for losses alleged to have been sustained by fire to the extent of \$13,432. The answer is a general denial. The defendants further aver that the policy sued upon is null and void by its conditions, the plaintiffs having taken a policy on the same risk with the Star Mutual Insurance Company without notice thereof to the defendants in violation of an express stipulation in the policy that "in case the insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect. And if the said insured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give

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notice thereof to this corporation and have the same indorsed in this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect."

In the court below the case was before a jury, which rendered a verdict for the amount claimed. The defendants have appealed.

The policy upon which this action is founded bears date December 29, 1863, and was for one year. The plaintiffs had previously, viz: on the twenty-first of January, 1863, taken a policy on the same risk to the extent of \$5000 from the Star Mutual Insurance Company for the period of one year. This policy was renewed for twelve months from the twenty-first of January, 1864, to the twenty-first January, 1865. It does not appear that the plaintiffs ever gave notice to the defendants of their having insured the same property in the office of the Star Mutual Insurance Company. No entry of such notice appears on the original act, nor does any acknowledgment of notice appear on the instrument. It would seem from the tenor of the act and from the current of decisions on this subject the plaintiffs have forfeited their right to recover from the defendants in this case. The cases reported in 3 Rob. 385 and 7 Rob. 351 are in point; 2 Peters 29, and 16 Peters 510.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendants—the plaintiffs paying costs in both courts.

No. 2353.—STATE OF LOUISIANA ex rel, D. SCULLY et al. v. CANAL AND CLAIBORNE STREETS RAILROAD COMPANY.

A mandamus will not lie to compel a board of directors of a street railroad company to collect an installment due by the subscribers on the stock of the company, where, by a clause in the charter of the company, they have vested in them a discretion as to the time and the manner of making the collection.

As a general rule the writ of mandamus will not lie to compel an officer or a company to do an act coming within the range of their duties where the law or the charter under which they act has vested in them a discretion to do or not to do it.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Hornor & Benedict*, for relators, appellants. *H. D. Ogden*, for defendants and appellees.

WILY, J. The relators have appealed from the decision of the court below on a rule *nisi*, refusing to grant the writ of mandamus sought by them in this case.

The complaint is that the officers of the corporation known as the Canal and Claiborne Streets Railroad Company fail or refuse to discharge their ministerial duty; that they refuse to collect from the subscribers of stock the balance due by them, amounting in the aggre-

State ex rel. Scully et al. v. Canal and Claiborne Streets Railroad Company.

gate to \$175,000, although the said corporation is largely in debt; that if the said subscriptions were collected there would be funds sufficient to discharge the liabilities of said corporation; that the relators are agrieved and prejudiced by this failure of duty, because they hold each one hundred shares of capital stock of said company, which was given them as part of the price of the sale of the right of way now enjoyed by said company; that in transferring to the said corporation the right of way for a street horse railroad on Claiborne and other streets, acquired by relators and others from the city of New Orleans, it was stipulated that they and their co-owners should receive "five hundred shares of the capital stock of the Canal and Claiborne Streets Railroad Company, said shares considered as fully paid, to enjoy all the privileges and advantages of an equal number of shares paid in full, and to be exempt from any and all calls, tax or assessments whatsoever;" that the relators were each to be stockholders of a hundred shares, considered paid up, and the capital stock of said company was to be \$600,000, whereas the capital stock of said company is now but \$425,000, thus diminishing the value of their shares; that the profits are being exhausted in paying the interest on the debt of \$150,000, which the company owes, and this deprives the relators of their share of its earnings; that if the said cash subscriptions were paid up it would be sufficient to pay the debt aforesaid, and the relators would thereby receive their share of the earnings of said company.

The prayer of the petition is that a writ of mandamus be issued to said Canal and Claiborne Streets Railroad Company, its president, directors and officers commanding it, him and them to proceed at once to the collection of the unpaid subscriptions to its capital stock, amounting to \$175,000, and in the event of the refusal of the subscribing stockholders to pay the balance of their subscriptions, to proceed to the forfeiture of their stock in accordance with the provisions of the charter of said company, and with the funds so realized that the said president, directors and officers proceed as speedily as possible to the cancellation of the debts of said company.

The defense is:

First—That the petition discloses no cause of action to authorize the remedy.

Second—That were the allegations true the relators have other remedies.

Third—That the amounts to be paid and the times of payment are, by the charter and the agreement signed by the relators, left to the discretion of the Board of Directors.

We think the last objection fatal to the pretensions of the relators.

Article four of the charter of this company provides that: "The

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capital stock of this corporation is hereby fixed at \$600,000, represented by six thousand shares of one hundred dollars each; five per cent. of each subscription shall be payable at the signing of these articles, and the balance shall be paid at such times and in such amounts or installments as the Board of Directors may order; provided, that not more than ten per cent. of said subscription shall be called for oftener than once within every thirty days. Should any subscriber refuse or neglect to pay punctually his installment or installments as the same may mature and fall due, interest thereon at the rate of eight per cent. per annum shall be added thereto from maturity till payment, and if any subscriber neglect or refuse to pay his installment or installments within thirty days after the specified time of payment, the Board of Directors reserve to themselves the right of causing any share or shares upon which any installment may be due, to be sold at public auction or otherwise, after ten days previous notice to such delinquent subscriber."

We think the amount to be collected by the corporation from its subscribers, and the time of payment thereof is left by the article of its charter just quoted, to the discretion of the Board of Directors. It is well settled that the writ of mandamus will not lie to compel the officers of a corporation to perform a discretionary act. See *State, ex rel. Mahan, v. Dubuclet*, State Treasurer, and authorities there cited, lately rendered. Also, the *State, ex rel., Bonnabel v. Police Jury, parish of Jefferson*, lately rendered. *State, ex rel., Burnett v. H. C. Warmoth et als.*

It is therefore ordered that the judgment of the court *a qua* rejecting relator's application be affirmed with costs.

No. 3243.—B. F. BURNETT v. P. A. WALKER, Administrator.

The act of the twenty-second of December, 1865, giving to every head of a family the right to hold exempt from seizure by his creditors one hundred and sixty acres of land and other personal effects as a homestead does not apply to succession property. Therefore, if such property has passed into the succession, it may be sold for the payment of the debts thereof, notwithstanding this statute.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Greves & Dupree*, for plaintiff and appellee. *J. W. Burgess* and *A. S. Herron*, for defendant and appellant.

HOWELL, J. The plaintiff alleges that he has a family, consisting of a wife and four minor children, dependent on him for support; that he owns and resides on a tract of land of two hundred and fifty-six acres and the improvements thereon, and also a tract of one hundred and sixty acres adjoining; that the defendant, as administrator of the succession of plaintiff's deceased wife, caused said land and all the

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First—That the petition discloses no cause of action to authorize the remedy.

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It is therefore ordered that the judgment of the court *a qua* rejecting relator's application be affirmed with costs.

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APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Greves & Dupree*, for plaintiff and appellee. *J. W. Burgess and A. S. Herron*, for defendant and appellant.

HOWELL, J. The plaintiff alleges that he has a family, consisting of a wife and four minor children, dependent on him for support; that he owns and resides on a tract of land of two hundred and fifty-six acres and the improvements thereon, and also a tract of one hundred and sixty acres adjoining; that the defendant, as administrator of the succession of plaintiff's deceased wife, caused said land and all the

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movables thereon to be inventoried as belonging to said succession and is proceeding to sell the same at probate sale to pay the debts of the succession, without regard to plaintiff's right to a homestead under the act of twenty-second December, 1865, and he prays that one hundred and sixty acres of land, comprising the residence, and other improvements and certain movables specified in said act be decreed to be the property of plaintiff and exempt from seizure and sale.

The defendant answers that he is about to sell said property, but denies that plaintiff is entitled to the property claimed; avers that the statute invoked does not apply to successions and that the whole property is liable to be sold to pay debts. Judgment was rendered in favor of plaintiff, and defendant appealed.

The plaintiff has not shown title to the land in question, and although it seems to have been inventoried as community property, he does not object to its sale as the property of his wife's succession, and we must, therefore, consider it as really belonging to said succession and apply the law invoked accordingly; for we are not informed by the counsel of either party by what authority the administrator of a deceased wife can administer the property of the community of which the surviving husband is the head, and sell the property thereof to pay the community debts. Viewing the property as belonging to the succession, we concur in the position of defendant that the law invoked by plaintiff does not apply in succession sales and that he can not under it secure the homestead provided by it. The law, in its terms, applies to sales under executions. See Revised Statutes, p. 333.

It becomes, therefore, unnecessary to examine the important question, discussed by both counsel, whether, under the Constitutions of the State and United States, the act of 1865 can be enforced against creditors whose claims existed at the date of the passage of said act.

It is therefore ordered that the judgment of the district court be reversed and that there be judgment dismissing plaintiff's demand, with costs in both courts.

No. 3203.—D. D. DE MOSS v. COBB, MANLOVE & CO.

Prescription does not run against the action to annul a judgment that has been rendered against a person incapable of standing in judgment. C. P. 612. The confession of judgment by a minor is a nullity which dates from its rendition, and the subsequent acknowledgment of liability under the judgment after he becomes of age, will not render valid the judgment which is void from the date of its rendition.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. & T. P. Farrar*, for plaintiff and appellee. *Sparrow & Montgomery*, for defendants and appellants

HOWELL, J. The plaintiff enjoins the execution of and seeks to annul a judgment by confession in favor of defendants, on the grounds

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that when, in October, 1861, the judgment was rendered he was a minor under the age of eighteen and incapable of standing in judgment, and that his tutor, D. M. Dancy, who with the counsel of defendants, induced him to sign a pretended confession of judgment, is the real debtor of defendants, and was at the time and is now indebted to plaintiff.

The defense is a general denial, and the allegation that prior to confessing judgment plaintiff was judicially emancipated and had settled with his tutor, and that the debt on which the judgment was based inured to plaintiff's benefit. Prescription is also pleaded.

Article 612 C. P. declares that the nullity of a judgment against one not qualified to appear in a suit may be demanded at any time, unless the defendant suffer the judgment to be executed against his property without opposition. Prescription, therefore, does not apply if plaintiff was a minor, as alleged.

As to his age, it is clearly shown that when the alleged emancipation was granted, and the agreement or settlement with his tutor was entered into, he was under sixteen, and when the confession was made and the judgment thereon rendered, he was only a few days over seventeen. These acts were consequently nullities. It is contended, however, that the evidence shows that after plaintiff became of age, he acknowledged his liability under the judgment, and its nullity was thereby cured. The evidence does not sustain this position, but if it did we are not prepared to say that such an acknowledgment would give validity to a judgment null at the date of its rendition. The acknowledgment might be the basis of another judgment on the debt.

Judgment affirme

No. 2003.—JOHN STEIB v. JOSEPH KAISER.

A surrender by an insolvent and the acceptance of the cession, vests the title to the property surrendered in the creditors. The insolvent can not, therefore, after the surrender is made, set up any claim to the property surrendered, founded on the charge that the property surrendered has been fraudulently sold or disposed of by the syndic of the creditors. The insolvent, having parted with all interest in the property by the surrender, can not be heard to complain of the illegal, fraudulent or simulated sale thereof by the syndic. He can not, therefore, maintain an action for the property which he has surrendered, against the purchaser at syndic's sale, on the ground that the sale made by the syndic was simulated, because if the sale by the syndic be shown to be simulated and null, that nullity would not inure to the benefit of the insolvent.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Preston & Labatt*, for plaintiff and appellee. *W. B. Hyman and Lacey & Butler*, for defendant and appellant.

TALIAFERRO, J. This is a petitory action to recover from the defendant, who is alleged to be in possession of and wrongfully to withhold from the petitioner, seven lots of ground in the parish of

Jefferson. The petition avers that he purchased the property sued for at a syndic's sale of property surrendered to his creditors by the defendant; that on the twenty-ninth of June, 1866, the defendant made a formal surrender of property under the insolvent laws of the State; that the surrender was duly accepted, a syndic appointed, and the property sold in pursuance of an order of the Third District Court of New Orleans; that, by the surrender, the title of the property passed to the defendant's creditors, and that plaintiff acquired title by virtue of the syndic's sale.

The defendant denies that petitioner has any legal right to the property in question. He avers that the plaintiff and one Krieger, purporting to act as syndic in the matter of *Kaiser v. His Creditors* pending in the Third District Court of New Orleans, conspired together to defraud both the defendant and his creditors; that the proceedings, by which the apparent title to the property was placed in Steib were all illegal and fraudulent; that the price pretended to be given was simulated and fictitious; that defendant has never been dispossessed; that there has never been any sale of the property on account of the creditors, and if the property is not his, it belongs to the creditors. He alleges that Krieger is still syndic. He prays that Krieger be made a party, in his capacity of syndic, to protect the interests of the creditors. He prays that the plaintiff's suit be dismissed.

Vandine, alleging himself to be a creditor of Kaiser, intervened in the suit, and adopts the allegations of the defendant. He prays citation against all the parties; that the suit be dismissed, and the property be decreed to belong to the creditors; that the creditors, and especially the opponent, have judgment against Steib, etc.

Judgment was rendered dismissing the intervention, and decreeing the plaintiff owner of the property in dispute, and that he be put in possession. A second trial was had, with the same result. From the judgment rendered the defendant alone has appealed.

The proceedings taken in this case on the part of the defendant and intervenor seem to be of a novel character. They clearly are without that definiteness which it is desirable pleadings should always possess.

The defendant does not pretend that he has a better title than the plaintiff, nor does he pray to be decreed owner. The plaintiff shows muniments of title which indicate upon their face that he is the legal owner. The defendant does not deny the fact of his surrender in insolvency. This is clearly shown by the records introduced in evidence. These show that the very property in controversy was surrendered and sold, and that the plaintiff became the purchaser. The formal surrender of the property and the regular acceptance of the cession vested the title in the creditors. The defendant afterwards had no interest in the subsequent proceedings taken by the syndic or

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the creditors. If there existed fraud and simulation in the matter of the sale, such as would have the effect of annulling the sale, we do not see how this could in any manner work injury to the defendant. It would seem rather to concern the creditors. But none of them are complaining. True, one of them intervened in this suit, but his claims and pretensions were rejected by the court below, and he has not appealed. We think the judgment of the lower court correct. Revised Statutes, page 356, section 1791; *Morgan v. His Creditors*, 7 L. R. 62.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 2078.—BULLIER, Wife, et al., v. FRITZ HUPPENBAUER.

A prior mortgage creditor who holds a mortgage which contains the pact *de non alienando*, may pursue the property in the hands of a third holder without resorting to the dilatory proceeding by an hypothecary action. Therefore, if the junior mortgage creditor has caused the property to be sold, and it fails to bring an amount sufficient to pay the prior mortgage, then the prior mortgageor, whose mortgage contains the pact *de non alienando*, may proceed by executory process against the property mortgaged in the hands of the third possessor without resorting to the hypothecary action.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. A. Robert*, for plaintiff and appellant. *E. Cambray*, for defendant and appellee.

WYLY, J. The plaintiffs have appealed from a judgment in favor of the defendant rejecting their petitory action, instituted for the recovery of a lot of ground on the Metairie road, held and possessed by the defendant.

It appears that the property in dispute belonged to Florentin Berthier, and that the plaintiffs and the defendant were the holders of special mortgages bearing thereon, the mortgage of the plaintiffs being superior in rank to that of the defendant. It further appears that in 1865 the defendant foreclosed his mortgage and purchased the property, retaining the proceeds of the sale in his hands, the price of adjudication to him being less than the amount of the prior special mortgage in favor of the plaintiffs.

It also appears that in 1867 the plaintiffs, foreclosing their mortgage, became the purchasers thereunder of the lot of ground in dispute, and which they now seek to recover possession of.

The defendant contends that having a *prima facie* title, it could only be attacked by a direct action for the nullity which the plaintiffs contend it contains, by reason of the adjudication to him, the junior mortgage creditor, for a sum less than the amount of the prior special mortgage in favor of the plaintiffs; that the nullity complained of by the plaintiffs should have been asserted in a direct action, or they should have resorted to an hypothecary action against him

It is unnecessary to consider whether the sale to the defendant was regular or not; whether the adjudication to him at a sum less than the amount of the prior special mortgage in favor of the plaintiffs, was a relative or absolute nullity.

The right of the plaintiffs to seize the property and subject it to their prior special mortgage, without regarding the defendant's title or without an hypothecary proceeding, is a right which they had by virtue of their prior mortgage, which contained the pact *de non alienando*. With this clause in their mortgage, they had the right to enforce it on the property in the hands of the defendant, the third possessor, without the delay of an hypothecary proceeding.

The adjudication to the plaintiffs under the first mortgage divested the title of the defendant derived from the purchase under the junior mortgage, and invested them with the ownership of the property.

It is therefore ordered that the judgment appealed from be reversed and annulled, and that there be judgment for the plaintiffs, recognizing the validity of their title and requiring the defendant to deliver to them the possession of the property, and to this end let a writ of possession issue; let the defendant pay costs of both courts.

No. 2665.—SAMUEL M. DAVIS *v.* HENRY C. THOMAS—CATLIN,
Intervenor.

A leased a plantation in the parish of Concordia to B for a fixed amount as the rent for one year. In the month of May the lessee sold to a third party all the work animals, carts, plantation supplies, etc. In the month of June following, the lessor caused them to be provisionally seized on affidavit showing that the third purchaser was about to remove them off the place, and defeat his lien thereon for the payment of the rent. The third party, who had purchased the property from the lessee after the lease had been given, intervened, and claimed the ownership of the personal property which had been seized at the suit of the lessor.

Held—That the privilege of the lessor for the payment of the rent having attached to the work animals, agricultural implements, etc., before the sale by the lessee to the intervenor, he could not, although he was the owner, defeat the seizure; further, that it not being made out clearly that the sale was genuine and that the intervenor was the real owner of the property, he could not be adjudged to be entitled to the residuum after paying the lien thereon.

APPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J. W. B. Spencer*, curator *ad hoc*, for plaintiff and appellee. *A. N. & H. Ogden* and *Farrar & Reeves*, for intervenor and appellant.

TALIAFERRO, J. The plaintiff, by his agent Smith, leased a plantation to the defendant for the year 1867 for \$7000. The contract was entered into on the fifteenth of January, 1867. On the eleventh of May following, Thomas sold to Catlin all the work animals, agricultural implements, carts, plantation supplies, etc. In consideration whereof Catlin bound himself to furnish from time to time, as they might be needed, the supplies necessary for carrying on the cultivation

during the lease. And for the further consideration of the one-third part of the proceeds of the crop, after deducting all expenses, Catlin was obligated to devote his time to the management and supervision of the plantation. On the third of June succeeding this agreement between Thomas and Catlin, Smith, the plaintiff's agent, took out a provisional seizure upon an affidavit that he believed Thomas was about to run off from the place all the personal property on the plantation subject to his lien and privilege, and dispose of it for his own benefit. A seizure was made of all the property claimed as subject to the plaintiff's lien, and it was appraised by the sheriff's inventory at \$933.00. On the third of July Catlin filed his intervention. A curator *ad hoc* was appointed to represent the plaintiff, and one to represent the defendant. Thomas, the defendant, by his curator answered on the twenty-ninth of November, 1867. The litigation was protracted. The curator appointed for the plaintiff filed his answer to the intervention in October, 1869. The stock, mules, oxen, etc., expensive to keep, were sold under an order of court in January, 1868, and the proceeds held subject to the decision of the case.

The plaintiff had judgment against the defendant for \$7000, with five per cent. interest from fifteenth November, 1867, with recognition of privilege upon the personal property (or its proceeds) seized under the writ. The intervenor's claims were rejected and his intervention dismissed. The court reserved to him the right to set up in a direct action against the plaintiff any claims he may have against him in damages arising from the provisional seizure of the property.

The intervenor has appealed. There are numerous bills of exception in the record, which in a decision of this case we do not consider it important to examine. We see no error in the judgment. The property which the intervenor claims to have purchased from Thomas, the plaintiff's lessee, was clearly the property of Thomas, and placed by him on the leased premises before the time at which the intervenor alleges he purchased from him. The intervenor's ownership of the property, as against the plaintiff, was not made out to the satisfaction of the judge *a quo*. But if he became the owner, it is clear that he became so after the lessor's privilege had attached. There was no contract of any kind between the plaintiff and the intervenor. The latter could not oppose the exercise by the former of his privilege upon the property seized. The intervenor's pretension to the right of setting up damages he alleges he has sustained by the acts of the lessor, in compensation of the rent due the lessor by the defendant, we do not consider well founded. This being the chief ground upon which he intervened, we think the court properly disregarded his claims.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs

No. 3113.—JOHN B. PITTMAN *v.* C. C. OBERCAMP—A. A. MAGINNIS,
Intervenor. R. R. BARROW, Warrantor.

R. R. Barrow owned a tract of land near the town of Donaldsonville, in Louisiana, known as the Winter Plantation. In 1862 he executed a mortgage on the entire tract in favor of Maginnis, with the pact *de non alienando* contained therein. In 1868 he sold thirty arpents of the tract lying contiguous to the town of Donaldsonville to one Pittman. Subsequent to this sale, Maginnis had caused his mortgage to be foreclosed, and had bought the entire tract at sheriff's sale.

Pittman now brings suit for the thirty arpents which he had lately purchased from Barrow, which is contained in the Winter tract, against the possessor, who disclaims title in himself, but avers that he holds possession under a lease from Maginnis. Maginnis intervened, and asserted title to the entire tract under his purchase at sheriff's sale. The evidence shows that the thirty arpents sold by Barrow after he had executed the mortgage to Maginnis with the pact *de non alienando* therein contained, was included in the tract known as the Winter Plantation, which was covered by the mortgage.

Held—That the sale by Barrow after the mortgage was given, with the pact *de non alienando* of a portion of the land mortgaged, was a nullity, so far as the mortgage was concerned; that the subsequent sale for the benefit of the mortgage creditor of the entire tract, without reference to the sale made of a part thereof by Barrow, conveyed the title to the purchaser to the whole tract; that the purchaser from Barrow after the mortgage had been given, acquired no title whatever as against the mortgage creditor to that portion of the tract conveyed by Barrow subsequent to the act of mortgage which contained the pact *de non alienando*.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Beaurais, J. C. C. Belcher*, for plaintiff and appellant. *R. N. Sims*, for intervenor and appellee.

Howe, J. The plaintiff commenced this suit against the defendant, Obercamp, claiming a tract of land of about thirty arpents, adjoining the town of Donaldsonville, in virtue of a sale from R. R. Barrow, of May 27, 1868.

The defendant, disclaiming title, alleged that he held the land by a lease from Maginnis. Maginnis intervened, asserting title to the tract by purchase at sheriff's sale of the "Winter Plantation," in which it was included, which sale was made June 9, 1868, in enforcement of a mortgage made by R. R. Barrow to Maginnis in 1862. He asked for damages against plaintiff for slandering his title to the tract in controversy, but as none were given by the judgment in his favor upon the question of title, and he does not ask for any amendment of the judgment, we apprehend that the questions raised by appellants as to this branch of the case do not require to be passed upon.

The plaintiff, Pittman, answered the intervention, setting up title under the act of sale from Barrow of May 27, 1868, and called his vendor in warranty. Barrow answered the call in warranty, alleged that Pittman was in possession of the property in dispute; excepted for this reason to the right of Maginnis to claim damages for slander of title, and recited the sale to Pittman of May, 1868. He alleged, in substance, that the land in dispute had been separated from the Winter Plantation before he mortgaged the same to Maginnis, and was not included in the mortgage and sheriff's sale to the latter; that it had

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been laid out as an "addition" to the town of Donaldsonville, as appeared by his act of sale to Pittman; that a plan thereof, divided into squares and lots, had been deposited in the office of the parish recorder, and that the tract in question had not formed a part of the Winter Plantation since 1850. He further recited the act of mortgage to Maginnis of 1862, and reiterated his averment that it did not include the property in dispute.

The act of sale from Barrow to Pittman of May 27, 1868, conveys the property by the following description: "All of the squares and lots standing in the name of said Barrow contained between the lines expressed on a plot or survey called "Barrow's Additions," made by Valarian Sulakowski, civil engineer, as intended to indicate the addition made by said R. R. Barrow to the town of Donaldsonville, which plan is on file in the office of the recorder of the parish of Ascension. The property herein conveyed being originally a portion of the Deville Plantation of said Barrow (which plantation is now agreed to be sold to A. A. Maginnis at sheriff's sale to satisfy a mortgage thereon), and is bounded on the lower side by the upper line of the aforesaid plantation, or the street dividing the same, called, for sake of reference, Division street, in front by the public road on the Bayou Lafourche, in the rear by lands of Rightor, and above by the last street of the corporation of the town of Donaldsonville, reference to be made to the charter of the town for the name." * * *

The mortgage of March 31, 1852, from Barrow to Maginnis contained the pact of non-alienation, and described the property as follows: "A certain plantation, together with all the improvements, etc., situate in the parish of Ascension, in this State, and known as the 'Winter Plantation,' and containing 500 arpents, more or less, bounded in front by the Bayou Lafourche, on the upper side by Division street and the lands belonging to Rightor, the church, Volney and Philips' Landing land, on the lower side by the land of Cabaive, and in the rear by Volney and Philips' Landing land, all of which will appear by reference to the annexed sketch of said plantation."

Maginnis, who in his intervention had alleged that the designation in his title of "Division street," was an error, "the said street never having had any existence whatever, either of record or (in) fact," filed a supplemental petition, alleging that said error arose from the designation of said boundary line as "Division street" in the act of mortgage, the name "Division street" being used as descriptive of the upper limit of said plantation, and to indicate the last street of the town of Donaldsonville on its lower boundary; "that the name of the said street was at the time of the execution of the aforesaid mortgage, and is now, Claiborne street, and not Division."

Upon these issues the parties went to trial, and after hearing

evidence, the judge below rendered judgment in favor of Maginnis, the intervenor, decreeing him the owner of the land in dispute, and quieting him in his title thereto. No disposition seems to have been made of the case as to the defendant Obercamp, or as between the plaintiff, Pittman, and his warrantor, Barrow. The plaintiff and the warrantor have appealed.

The description quoted from the mortgage to the intervenor, Maginnis, covers the land in controversy, and, being repeated in the deed to him, gives him the better title. In the first place, the thing mortgaged is described as the "Winter Plantation," which appears to have extended up to and adjoined the town of Donaldsonville, and thus to have included the tract in dispute, lying between the lower boundary of the town and the imaginary line called by the appellants "Division street." In the second place, the quantity of land (500 arpents) corresponds with this inclusion. If the land in dispute were not included, the tract would be less than 430 arpents. In the third place, the plan annexed to the mortgage shows the line thereon called "Division street," to be immediately adjacent to the town on its south side, with no interval whatever between, and therefore no room for the squares and lots alleged by the appellants to have been laid out and separated from the plantation in 1855 by Sulakowski. The term "Division street" seems to have meant really the "dividing street," that is Claiborne street, dividing the town from the Winter Plantation. The description and its annexed plan, which must be taken together, were sufficient, therefore, to advise the plaintiff that the land up to the line of the town was covered by the mortgage of the intervenor with its pact of non-alienation, and that no matter how many lots and squares and "additions" might have been projected by Barrow, the mortgage would cloud them all. We may add that it appears, by testimony admitted without objection, that Sulakowski never made any such plot or survey as that with which he is credited in the act of sale from warrantor to plaintiff, and that Claiborne street, at the date of intervenor's mortgage, was known generally as the dividing street between the town and the Winter Plantation.

What the appellants call Division street, is a line marked by some Cherokee roses, and we are informed by a bill of exceptions here insisted on, that upon the trial of the cause the warrantor "offered to prove that the tract of land situated between the Cherokee rose fence and Claiborne street had formerly been laid out as an addition to the town of Donaldsonville by the owner of the Winter Plantation into squares and lots." Upon objection, the court refused to permit the proof, and the warrantor excepted.

There are many reasons why this action of the judge, though perhaps founded on an incorrect theory, will furnish no reason for setting

aside the judgment of intervenor against plaintiff. A vague offer by a party who produces neither witness nor document, can have but little force. The warrantor only made the offer; the warrantor only excepted, and there is no judgment against the warrantor. The judgment is against plaintiff; he did not offer any proof of these alleged facts, and took no exception. It is by no means clear that we can set aside the judgment against *him*, even if the offered proof was improperly rejected. But, furthermore, in strictness the ruling was not such as in itself to require a new trial. The offer was very indefinite, and if permitted, and the proof made, our conclusions would still be the same. Grant that the tract, in the language of the bill, "had formerly been laid out as an addition to the town of Donaldsonville by the owner of the Winter Plantation into squares and lots," and the questions still remain unanswered. When was this done? By whom? And how can the fact affect the ability of Barrow in 1862 to mortgage the tract to Maginnis, and the real right thus established in favor of Maginnis?

We think the judgment is correct, so far as it goes, but that, as the appellant requests, the cause should be remanded; but only for proceedings as between plaintiff and warrantor.

It is therefore ordered that the judgment appealed from be affirmed, at appellant's costs. It is further ordered that the cause, as between the plaintiff and warrantor, be remanded to be further proceeded with according to law.

No. 3128.—HENRY SAFFORD *v.* THOMAS L. MAXWELL, Sheriff, and M. F. SOLDINI.

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124	808

A seizure of a judgment or a suit may be made by the sheriff under a writ of *feri facias* without resorting to the circuitous process of garnishment. C. P. 642. The act of 1839, authorizing the garnishment process in certain cases, is only cumulative, and does not interfere with or supersede the regular process of seizure and sale of incorporeal rights under a writ of *feri facias*. A writ of injunction will not therefore lie to restrain the sheriff from selling a judgment that has been seized under a writ of *feri facias* on the ground that the judgment which has been seized has not been signed by the judge; nor will it lie because an appeal has been taken from the judgment which has been seized. The sale of the interest of a party in a judgment may be made as well at public auction, under the seizure, as by private conventional agreement of the parties.

A PPEAL from the Eighth District Court, parish of Orleans. *C. M. Emerson*, Judge of the Third District Court, sitting in place of *H. C. Dibble*, Judge of the Eighth District Court, absent. *Randolph, Singleton & Brown*, for plaintiff and appellee. *F. Fuselier*, for defendant and appellant.

WYLY, J. Under a writ of *feri facias*, issued by the District Court of the parish of Natchitoches, in the case of *Marie Félicie Soldini v. Henry Safford*, the sheriff of the parish of Orleans seized on the twenty-fourth of June, 1870, "a certain judgment rendered by the

Fourth District Court for the parish of Orleans, in favor of Henry Safford against Daniel R. Carroll, on the sixteenth of June, instant, in the suit entitled 'Henry Safford v. D. R. Carroll,' being No. 22,395 of the docket of said court; the said judgment being for the sum of two thousand and five hundred dollars, with eight per cent per annum interest from the first of January, 1869; together with all the right, title, claim, interest of said Henry Safford in and to the aforementioned suit No. 22,395." The seizure was duly notified by notices served on Safford, D. R. Carroll and the clerk of the Fourth District Court.

The sheriff having proceeded to advertise the property for sale, the seized debtor, Henry Safford, sued out and obtained, from the Eighth District Court an injunction, which was made perpetual by a judgment from which this appeal is taken.

The plaintiff contends that the seizure which he enjoins was illegal on the following grounds, to wit: That the judgment, not having been signed, was imperfect, and, as a judgment, was not the subject of seizure; that the pretended seizure was made on or before the twenty-fourth June, whereas the judgment was not signed till June twenty-seventh; and that, after signing, the defendant, Carroll, took a suspensive appeal, which is yet pending; that a judgment, thus suspended by appeal, is but an incorporeal right, in the nature of a *claim* of debt, and can not be seized under *fieri facias*, except by process of garnishment, and by propounding interrogatories to the judgment debtor, and then awaiting the decision of the Supreme Court; after which, should the judgment be sustained, the plaintiff (in *fieri facias*) would have the right, by virtue of the garnishment, to collect such part thereof as would pay his debt; that the judgment, in its present condition, can not be sold, because no fair or intelligent appraisement can be made, inasmuch as it depends upon the decision of the Supreme Court whether the claim has any value whatever. It is also averred, that as a seizure of an interest in a suit, it is void for vagueness, and that the only mode of seizure of such interest is by process of garnishment, as aforesaid.

We are unable to agree with the counsel of the plaintiff and with the learned judge who tried the case below, that the seizure of the suit and judgment complained of was illegal, and the only way by which a suit or judgment from which an appeal has been taken can be seized is by garnishment process under the act of the twentieth of March, 1839.

That remedy is merely cumulative. Under article 647 of the Code of Practice "the sheriff may seize the rights and credits which belong to the debtor and all sums of money which may be due him in whatever right, unless it be for alimony or salaries of office."

In *Righter v. Slidell*, 9 An. 605, and *Hanna v. Bry*, 5 An. 656, it was

Safford v. Maxwell, Sheriff, and Soldini.

held that the statute of the twentieth of March, 1839, giving an auxiliary and cumulative remedy to the judgment creditor produced no change in articles 642 and 647 of the Code of Practice, and "that the proper mode of seizing a debt existing in the form of a judgment is a notification of seizure by the sheriff to the judgment debtor."

In our opinion, it makes no difference whether the judgment has been completed by the signature of the judge, or whether an appeal has been taken; in either case the suit and the judgment can be seized under a *fieri facias* by the sheriff by service of the notice of seizure on the plaintiff and defendant in the seized judgment or suit.

There is no reason why a suit may not be seized as well as a judgment under a writ of *fieri facias*, both being incorporeal rights; and we see no reason why the transfer may not as well be made at forced sale as at a conventional sale.

We see no reason to compel a judgment creditor to resort to the delay of the garnishment process in order to ascertain a credit belonging to his debtor, when evidence of that incorporeal right appears on the public records in the form of a judgment or suit. The object of the garnishment process provided by the act of the twentieth of March, 1839, was to enable a judgment creditor to reach the property, rights or credits of his debtor in the hands of third parties, the extent of which might be ascertained by the answers of the garnishee.

We think the property was properly seized in the case before us, and that the court below erred in perpetuating the injunction.

It is therefore ordered that the judgment appealed from be reversed and annulled, and that the injunction herein be dissolved. It is further ordered that the defendant, M. F. Soldini, recover judgment against the plaintiff and the surety on his injunction bond, *in solido*, in the sum of two thousand dollars damages and all costs.

No. 2053.—THE STATE v. PETER COOK.

What a deceased witness testified on a former trial in a criminal case may be proved by a witness who was present and heard the deceased witness testify. The witness giving evidence of what the deceased witness testified to on a former trial must, however, give his evidence from his own recollection. If the witness who heard the deceased witness testify on the former trial be the attorney of the accused on both trials, the State, nevertheless, has the right to have his testimony on this point, his recollection of all the important facts testified to by the deceased witness in favor of his client being presumed.

APPEAL from the Fifth Judicial District Court, parish of Iberville.
Posey, J. J. C. Stafford, District Attorney, for the State. W. B. Robertson, for defendant and appellant.

WYLY, J. The defendant having been convicted on an indictment for robbery and sentenced to imprisonment at hard labor for seven years, has appealed.

Our attention is directed to a bill of exceptions taken by the defendant to the ruling of the court in receiving the testimony of E. W. Robertson to prove what was sworn to on a former trial between the same parties on a charge for the same offense by the witness, Mrs. Lizzie Clark, since deceased. The objections to the testimony stated in the bill are:

First—The witness, Robertson, is the only counsel of the defendant, and he would be deprived of counsel while he was on the witness stand.

Second—He would be deprived of his right to meet the witness face to face upon this trial.

Third—Because the witness stated he could not remember the whole of the testimony or all the facts sworn to by the said Mrs. Lizzie Clark, alleged to be dead.

Fourth—Because the witness could not discriminate between all the facts sworn to by the said Mrs. Clark in her testimony in chief and on cross examination, nearly two years having elapsed since the testimony of Mrs. Clark was given, and witness not having taken notes.

The reasons assigned in the bill by the judge in support of his ruling are, viz: "The rule of evidence permitting the introduction of evidence of what was sworn to on a former trial between the same parties by a witness since deceased, would be, in my judgment, of but little importance if it required an infallible memory; the witness can only testify to the best of his recollection. The witness having been of counsel in the former trial and at all times since, able, alert and active in the defense of the prisoner, was rightly considered by the district attorney, I think, as being most of all competent and proper to give the substance of the deceased witness' testimony; and as his recollection corresponded with that of the district attorney, I am of the opinion that had the witness been living and present at the trial, she would have varied in no material respect from the testimony of Colonel Robertson either in her examination in chief or in her cross examination. Besides it is not likely that the counsel for the prisoner, able and efficient as he is, would have forgotten any important fact in favor of his client, and is too honorable at the same time not to testify just as fully as he could, from his recollection, what she said in favor of the State. For these reasons I thought it my duty to overrule the objections of the counsel and to admit the evidence under the authority of the rule."

We think the court did not err in receiving the testimony.

What the deceased witness testified at the former trial, it was competent to prove by any person swearing from his own memory; and the recollection of the counsel of the prisoner of all the important facts in favor of his client is presumed to be as good as that of any other person hearing the declarations of the deceased witness.

The State v. Cook.

Mr. Greenleaf, in his work on evidence, says: "The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross examine the witness. But where the testimony was given under oath in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross examine and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted after the decease of the witness in any subsequent suit between the same parties."

And the same author also says: If the person called to prove what a deceased witness testified on a former trial be required to repeat his precise words, the effect would be to exclude this sort of evidence altogether; it is sufficient if the witness can state the substance of the testimony given at the former trial. Greenleaf on Evidence, vol. 1, pp. 193, 194, 195, 196.

The district judge did not err in receiving parol proof to establish the fact that Mrs. Lizzie Clark was dead, and the bill of exceptions taken thereto by the defendant was not well taken.

The motion in arrest of judgment on the ground that the indictment is materially and substantially defective and is not drawn up according to the form of the common law of England, was properly overruled by the judge; all the substantial averments necessary in an indictment for robbery are clearly set forth and the indictment is sufficiently formal.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

No. 2745.—BOARD OF HAY INSPECTORS v. CHARLES PLEASANTS.

The charge of ten cents per bale for weighing and inspecting each bale of hay brought to the port of New Orleans for sale, imposed by the acts of the General Assembly of 1867 and 1868, without reference to the State or place where the hay is made, is not a regulation of commerce between the States which is prohibited to the States by article one of the Constitution of the United States. Nor, secondly, does this statute lay any impost or duty on imports or exports. It being, therefore, neither a regulation of commerce between the States, nor an impost nor duty on imports or exports, it is valid, notwithstanding the amount herein imposed may not be absolutely necessary for the enforcement of the inspection laws of the State.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Braughn & Ogden*, for plaintiffs and appellees. *Randolph, Singleton & Brown*, for defendant and appellant.

HOWE, J. The plaintiffs instituted this suit to recover from the defendant the sum of \$315 60 for official compensation of plaintiffs for weighing and inspecting hay in accordance with the act of 1867, as amended September 18, 1868.

We have no jurisdiction of this cause, by reason of the amount in dispute. We can only, therefore, pass upon one of the questions raised in the case, and that is the constitutionality of the acts in question, so far as they are supposed to levy a "tax, toll or impost of any kind." Constitution 1863, article 74.

The defendant makes but one point on this branch of the case, namely, that the provisions of the statute by which the inspection of hay is made compulsory, and the plaintiffs allowed to charge ten cents per bale for the services which defendant was thus compelled to demand from them, are in conflict with those clauses of the first article of the Constitution of the United States which, firstly, confer on Congress the exclusive power to regulate commerce with foreign nations and between the States, and secondly, prohibit a State, without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

The decisions of the Supreme Court of the United States in the recent cases of *Woodruff v. Parham* and *Hinson v. Lott*, 8 Wallace, 123, 148, furnish a complete answer to these objections of the defendant. The first arose out of a tax imposed by the city of Mobile on sales of merchandise, and upon the question of the regulation of commerce, the court said: "There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

Upon the question whether the ordinance of the city of Mobile amounted to the prohibited impost or duty on imports, the court held that the term "impost," as used in the clause referred to, does not apply to articles imported from one State into another, but to articles imported from foreign countries into the United States, and that therefore the ordinance was not invalid, as in conflict with this clause of the Constitution of the United States.

The other case, *Hinson v. Lott*, arose from a tax of fifty cents per gallon imposed by the State of Alabama on liquors introduced into the State for sale, the same tax being also imposed on liquors manufactured in the State, and the plaintiff sought to resist the tax upon five barrels of whisky consigned to him by one Dexter, of the State of Ohio. The court held that, although the mode of collecting the tax on the article made in the State was different from the mode of collecting the tax on the article brought from another State into it, yet the amount paid was in fact the same on the same article, in whatever State made;

Board of Hay Inspectors v. Pleasants.

that the law, therefore, did not discriminate against the products of sister States, but merely subjected them to the same rate of taxation paid by similar articles manufactured within the State; and accordingly it was not an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State.

Now, in the case at bar, the toll complained of is to be paid by every person who has hay inspected, whether the hay come from Louisiana or from other States. We gather from the record that the defendant's hay came from the Western States. It is certain that it was not imported from foreign countries, nor is it pretended that any hay is so imported. Upon the authority, therefore, of the cases above cited, we must conclude that the statutes in question do not violate the Constitution of the United States in the respects suggested, because:

First—They do not amount to the prohibited regulation of commerce between the States; and

Second—They do not lay any impost or duty on imports or exports.

The question whether the charge of ten cents per bale for inspection is "*absolutely necessary* for executing the inspection law" under consideration, has caused the taking of a mass of testimony in the record, and considerable argument. Having arrived, however, at the conclusion that the charge is in nowise "an impost or duty on imports or exports," we need not decide whether it is absolutely necessary for executing the inspection laws of the State. Not being included in the prohibition, it is not dependent for its validity upon a compliance with the rule of absolute necessity laid down in the exception to that prohibition. We may remark, however, that the charge of ten cents per bale in this case appears by the evidence to be a reasonable one.

Judgment affirmed.

No. 2251.—J. B. WOMACK, Administrator, v. ABRAHAM WOMACK et al.

Where a sale has been made by order of the probate court of the property of a succession for the purpose of affecting a partition among the heirs, and the administrator files his account of the partition, which is duly homologated by the judge, a subsequent suit for partition will not be entertained, because the title to the property constituting the succession passes by the sale to the purchasers, and can not afterward be returned to the succession to be again administered upon. The judgment of the court homologating the administrator's account of partition is *res judicata*.

APPEAL from the Parish Court of St. Helena. *James H. George*, Parish Judge. *Dirhammer & Kennard*, for plaintiff and appellee. *J. H. Muse*, for defendants and appellants.

TALIAFERRO, J. This is a suit for a partition of the property of the succession of Abraham Womack, Sr., deceased. The suit is brought by the plaintiff, who is one of the heirs, against his coheirs.

The answer is that a final partition has taken place, and that the same was duly homologated. The defendants plead *res judicata*. The plaintiff had judgment in the court below, decreeing that a partition be made, prescribing the manner of making it, and the parties were referred to a notary named to perform the work. Three of the defendants have appealed.

Soon after the decease of Abraham Womack, Sr., in 1860, the usual mortuary proceedings were taken. The plaintiff was appointed administrator, and he soon after petitioned for a sale of the property to pay debts and to effect a partition. The order of sale was granted, the property sold, the mass of it being purchased by the heirs, and in December, 1860, the administrator filed his account. Numerous oppositions were presented, and the contestation remained without final action until June, 1867. By the judgment then rendered, the account, with some modifications, was homologated and confirmed. No appeal seems to have been taken from this judgment. The present suit was instituted in September, 1869.

It seems clear that the object and main purpose of the sale in 1860 was to effect a partition by means of a licitation. The debts were few and unimportant. Each heir purchased property at the sale, and the receipts produced by the administrator and his own testimony show that the portion of each heir of the first degree was reckoned approximately at \$1000 cash. After the sale, a settlement in full was made by the administrator, with some at least of the heirs, for his own testimony shows that "the Thompson heirs and Powell paid the excess of their purchases over \$1000."

We regard the sale as having divested the succession of title in the property sold, and the partition executed to that extent. There remains now only an adjustment of the amounts respectively to be paid or received as the case may be by the several heirs, in order to make the partition definitive.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of first instance to be proceeded with according to law, the plaintiff and appellee paying costs in both courts.

Flash, Hartwell & Co. v. New Orleans, Jackson and Great Northern Railroad Company.

No. 2271.—FLASH, HARTWELL & CO. v. NEW ORLEANS, JACKSON AND
GREAT NORTHERN RAILROAD COMPANY

A receipt given by a railroad company for goods to be transported to another point on the line of the road, is not a bill of exchange, and is not, therefore, prescribed by five years according to article 3505 of the Civil Code.

In 1862, while the insurgent authorities had control of the city of New Orleans and its surroundings, the Jackson Railroad Company gave a receipt for 360 barrels of molasses, which they were to transport to some other point on the line of the road. Some two months and a half thereafter the United States forces captured the city and took possession of the road at New Orleans. The molasses was not transported by the company. The owner brings suit against the company on the receipt for the molasses, which had gone into their possession and had not been accounted for. On trial the company made the defense that at the time they gave the receipt the road was under the control of the insurgent military forces; that the plaintiffs consigned the goods for shipment with a full knowledge of the condition of affairs and took the risk incident thereto.

Held—That, under this state of facts, the burden of establishing these defenses devolved exclusively on the company, failing in which, the plaintiff must recover.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Clarke, Bayne & Renshaw*, for plaintiffs and appellees. *Campbell, Spofford & Campbell* and *L. E. Simonds*, for defendant and appellant.

Howe, J. Plaintiff sued for value of 360 barrels of molasses consigned at New Orleans by the defendant's railway in February, 1862. There was judgment for plaintiffs for the amount claimed, and the defendant has appealed.

First—The prescription of one year does not apply. The fact that the receipt given by defendant at the time it received the goods was in form like a steamboat bill of lading can not bring this case under the article (3501) of the Civil Code. The merchandise was not "shipped on board any kind of vessel."

Second—The prescription of five years, article [3505], does not apply. It is by no means clear that the phrase "effects negotiable or transferable by endorsement or delivery," (*tout effet négociable ou transportable par endossement ou par simple remise.*) includes regular marine bills of lading. The word *effet*, translated *effect*, means, in a commercial sense, "bill," or "bill of exchange," and in a financial sense, "funds" and "stocks," and we have never found it used in the sense claimed by counsel. But, however this may be, this action is not in reality on a bill of lading. It is an action against a land carrier. The paper called a bill of lading, as shown by the pleadings and evidence on both sides, was intended merely as a receipt, and was so used and introduced in this case. It was probably given in its absurd form from a scarcity of stationery in New Orleans at the time.

Third—The only defense on the merits which requires consideration is, in substance, that the war was raging at the time the goods were received from plaintiffs; that the defendant's railway was under the dominion of the insurgent authorities; that these authorities monopolized the transportation in such a way that it was impossible to

Flash, Hartwell & Co. v. New Orleans, Jackson and Great Northern Railroad Company.

forward the goods from the time they were received until the twenty-fifth of April, 1862; that on the latter day the city of New Orleans was captured by the United States forces, and the goods destroyed or carried off by a mob of citizens of New Orleans, and that the plaintiff consigned the goods with full knowledge of the fact that the defendant's railway was subject to military control, and they took all the risks of such a state of affairs. This might be a valid defense if fully established. The *onus* is on the defendant to make it out. We agree with the district judge that it has not been established. The permit for shipment of the goods was given about February 11, 1862. The written receipt was given February 26, 1862. During the long period that elapsed up to the twenty-fifth April, 1862, it appears by the testimony of the defendant's employes, that private freight was, by arrangement with the military authorities, transferred from New Orleans in large amounts. It is not shown with any certainty why the goods in question were not forwarded; nor does it appear, sufficiently, that the plaintiffs took the risks of a delay of from sixty to seventy-five days.

Judgment affirmed.
Rehearing refused.

23	354
46	490
23	354
52	1291
23	354
119	786

No. 3199.—EVAN GEORGE v. E. A. KNOX and Husband et al.

The vendor who wishes to avail himself of the action to rescind the sale of real estate, on the ground that the vendee has not complied with the condition of the sale by paying the installments at maturity, must show that he has returned to the vendee, or offered to return, that portion of the price which he has received. This offer to return the portion of the price which he has received must be made before suit is brought to rescind the sale. This preliminary step of the vendor cannot be avoided by his showing that the rents and revenues of the property were worth more than the amount he had received in part payment of the price, because, from the date of the sale, the title and ownership of the property passed to the vendee, and the rents and revenues thereof belonged to him and not to the vendor.

An agreement made by the attorney of the vendor with the curator *ad hoc*, who represented the vendee in a suit to rescind the sale, to the effect that the vendee was to take the rents and revenues of the property during the time that he had it in possession as an equivalent for the part of the price which he had already paid, is not binding on the vendee because the curator *ad hoc*, by virtue of his appointment as such, is not authorized to make such agreement.

APPEAL from the Ninth Judicial District Court, parish of Carroll. *Hough, J. M. Dubosc*, for plaintiff and appellant. *Sparrow & Montgomery*, for defendants and appellees.

LUDELING, C. J. This is an action for the resolution of a sale for the non-payment of the price.

In November, 1855, the plaintiff sold to Knox a plantation for \$34,000, payable in installments as follows: Four thousand dollars on the first day of March, 1856; three thousand dollars on the first day of March, 1857; and a like sum annually thereafter until the first of March, 1865.

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The first two installments, amounting to \$7000, were paid at their maturity; the other notes are still unpaid.

Citations in this suit were acknowledged on the eighteenth and twenty-second of May, 1868.

The note maturing on the first of March, 1858, was not paid. At that moment, the purchaser having failed to comply with his engagement, the resolatory condition, implied in all commutative contracts, took effect, and the seller had a right to sue for the dissolution of the sale. C. C. 2045, 2561.

And from the period when the seller had the right to sue to dissolve the sale for the non-payment of the price, prescription began to run against that right; therefore the action was barred by the prescription of ten years, when it was instituted in May, 1868. C. C., 3503; 11 An. 656, *George v. Lewis*; 14 An. 340, *Thompson v. Gelcnore*.

Besides, it appears from the allegations of the plaintiff's petition, that he has received \$7000 of the price, and this money he has not restored or offered to restore to the purchaser. He cannot keep the price and claim the property which was sold. 4 La. 198; 19 La. 281; 9 R. 306; 2 An. 389; 4 An. 562; 21 An. 425.

The plaintiff contends that the price received by him was compensated by the rents and revenues of the place while in the possession of the vendee, and he relies upon an agreement entered into between himself and the curator *ad hoc*, appointed to represent Knox, an absentee, which is as follows:

"It is agreed between the parties, plaintiff and defendant, first, that the plaintiff waives and renounces all claim or interest in and for rents and revenues claimed in the petition for the use and occupation of the lands or plantation by the defendants and their vendees, after their purchase from the plaintiff, and it is agreed, in the second place, that in consideration of the above remuneration on the part of the plaintiff, that the defendants hereby relinquish and renounce any and all claims for the repayment of any money or moneys they may have at any time paid said plaintiff for and in part payment of the price of the land, the sale of which is sought to be dissolved and rescinded by this suit. This — day of October, 1868.

(Signed)

" M. DuBOSE, Attorney for Plaintiff.

" ED. F. NEWMAN, Curator *ad hoc*."

The curator *ad hoc* had not the authority to make such an agreement, and even if he could lawfully have entered into it, it did not bind the estate of McNeil, the vendee of Knox, and the real defendant. The fruits of property belonged to the owner thereof, and the vendee was the owner of the property, and not the vendor.

It is therefore ordered and adjudged that the judgment of the district court be affirmed with costs of appeal.

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HOWE, J., *concurring*. I do not think this action is prescribed; but I concur on the second ground which forms the basis of the opinion of the court.

WYLY, J., *dissenting*. I think both the grounds upon which the opinion of the majority of the court is based, are erroneous.

The first is, that the action to dissolve this sale has been barred by the prescription of ten years; and the second is, it should not be dissolved, because the plaintiff has not restored or offered to restore to the purchaser the \$7000 received as part of the price. As to the second ground, it has not been pleaded by the parties; it was not an issue presented in the court below. Besides, it is nothing but a dilatory exception, tending merely to delay, not defeat the action, and ought always to be pleaded *in limine litis*.

I do not think the plaintiff should lose his case because he has omitted to prove that he offered to restore the price which the defendants' pleadings did not require him to do; and I do not think it proper to decide, as a matter of fact, that the plaintiff did not offer to restore the price, an issue upon which no evidence was taken and upon which the parties did not go to trial in the court below.

The dissolving condition, based upon the rule of equity, there can be no obligation without a cause, underlies every commutative contract; and it was upon this fundamental condition that Evan George, the plaintiff, transferred to his vendee, Mrs. Knox, his valuable property in the parish of Carroll, for \$31,000 on long terms of credit, and upon this condition George bound himself to warrant and defend the title.

It would be a violation of that great rule of equity if Mrs. Knox and her vendee are permitted to keep the property and hold George to his obligation of warranty after violating her obligation to pay the price; and if George be held to his obligation without an equivalent as to him, there will be an obligation without a cause.

The sale was made in 1855, and the installments were, \$4000 payable first of March, 1856, \$3000 on the first of March, 1857, and a like sum payable annually thereafter until the first of March, 1865. The promissory notes were given in evidence of the price, and only the first and second have been paid. The action to dissolve the sale is based upon eight of these promissory notes for \$3000 each, maturing annually from the first day of March, 1858, until the first day of March, 1865. In May, 1868, the plaintiff instituted this suit, demanding the dissolution of the sale on the ground that his vendee, Mrs. Knox, had violated her contract by failing and refusing to pay each of these eight notes.

I think this action is based upon eight violations of the contract by said vendee, each of which being a good ground to annul the sale.

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The engagement of the vendee was not to pay the first, second or third note only, it was to pay each note at its maturity. The obligation to pay the last note maturing the first of March, 1858, was just as binding as it was to pay the first; and failure or refusal to pay the last violated the contract just as much as the first. At each violation a right of action arose upon that instrument to demand the rescission of the sale.

When the plaintiff demands it on each of the eight notes in the record, failing to pay each being a violation of the contract, why should we select the first note maturing in March, 1858, and decide his action is based only on that note and not on the other seven? And because the action on that note, or for the violation of the contract in failing to pay it, is barred by the prescription of ten years, therefore the action is barred on the other seven also, although neither of them were ten years past due when this suit was instituted.

When the plaintiff complains of eight distinct violations, and shows it in the record, how can we say there has been only one violation, the failure to pay the note due March 1, 1858, which gave him a cause of action, and that is barred by the prescription of ten years. Suppose the plaintiff, anticipating this ruling, had made a voluntary remission of the note maturing the first of March, 1858, which would have discharged it, and then demanded the rescission on the other seven notes to which the prescription of ten years is not applicable, could the action have been defeated by the plea of prescription? Certainly not.

Now, shall we say that a man who has merely exercised a legal right, who has voluntarily remitted one note, stands stronger before the court in prosecuting his rights upon the others, than if he had chosen to be less liberal to his delinquent debtor? Suppose the note due the first of March, 1858, had passed into the hands of a person who had permitted the prescription of five and ten years to be acquired, would the defendant be heard disputing the fact that she violated her contract in not paying each of the other seven notes held by the plaintiff, or that he has no right to claim the rescission, because the party holding the note due March 1, 1858, did not do so?

If such be law, the great rule of equity, there can be no obligation without a cause, is defeated without a reason why it should be defeated.

Why should the vendee hold the vendor to his obligation after refusing to be bound by his own, simply because one of the notes fell into tardy hands, and has been permitted to be prescribed?

Should Mrs. Knox escape the dissolving condition claimed by her vendor, simply because the note due March 1, 1858, has been barred by the prescription of five and ten years, when the record shows that

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there are seven other notes which are not prescribed; at the maturity of each a right of action arose, to enforce the payment or demand the recision of the sale.

Because the plaintiff has lost his right upon one note by lapse of time, I do not see that he has lost it on the other notes to which the plea of prescription is not applicable.

I therefore deem it my duty to dissent in this case.

NO. 3346.—STATE OF LOUISIANA, ex rel. BOARD OF SCHOOL DIRECTORS,
v. The MAYOR and ADMINISTRATORS.

Section seven of the revenue law of 1871 prohibits all cities and municipal corporations in the State from levying a tax for any purpose, in any year, in excess of two per centum on the assessed value of all property therein listed for taxation. It being shown that the Council of the city of New Orleans has already levied a tax in excess of two per centum on the taxable property within the city limits. Held—That under the prohibition contained in the act above recited, the city could not be compelled by writ of mandamus to levy an additional tax for school purposes, although the General Assembly had by special act directed that the Council should levy a tax for such purpose.

APPEAL from the Eighth District Court, parish of Orleans. *Leaumont*, Judge of the Fifth District Court, parish of Orleans, presiding in place of Dibble, J., recused. *S. Belden*, Attorney General, and *J. P. Hornor*, for relators and appellants. *Geo. S. Lacey*, City Attorney, for defendant and appellant. *J. B. Eustis*, Esq., and *H. N. Ogden*, Esq., attorneys at law, appeared as *amici curi*, and argued in behalf of the taxpayers against the tax sought to be imposed by this proceeding.

HOWELL, J. The relators have appealed from a judgment refusing a writ of mandamus to compel the Mayor and Administrators of the city of New Orleans to levy and collect a tax sufficient to realize the sum of \$350,000 fixed by the said relators for the purpose of maintaining the free public schools in the city of New Orleans during the current year, in accordance with the provisions and requirements of act No. 8 of the Legislature of 1871, entitled "An Act to amend an act entitled an act relative to public education in the State of Louisiana and the city of New Orleans, and to raise a revenue for that purpose," approved February 25, 1871, the seventh section of which is in the following words: "The Board of School Directors for the city of New Orleans shall, immediately upon their organization, and also at the commencement of each year thereafter, ascertain the amount of funds necessary to carry on the schools under their charge for the current year and report the same to the Board of Administrators of the city of New Orleans, who shall, at such time as they may deem necessary, levy the amount on the taxable property of the city, and direct the same to be collected in the manner and at the time by them deemed most desirable, but the time shall not exceed six months from the date of their notification of the amount required."

State ex rel. Board of School Directors v. The Mayor and Administrators.

Among other reasons to justify their refusal, the respondents aver that section seven of the act No. 42 of the Legislature of 1871, entitled "An Act to provide a revenue, to levy and collect taxes, to grant and collect licenses, etc.," approved March 3, 1871, prohibits the City Council of New Orleans, the respondents, from levying any tax upon the property situated in said city, listed for taxation, to a greater amount than two per centum of the cash value thereof, and that there have already been levied upon said property taxes to the amount of two and five-eighths per centum of the value thereof, and the taxpayers are protected by said law from the payment of any other or further sum, unless by vote of the citizens entitled to vote in said city, and no such vote has been had on this question.

Section seven relied on reads as follows: "That no city or municipal corporation shall levy a tax for any purpose which shall exceed two per centum on the assessed value of all property therein listed for taxation; nor shall the police jury of any parish levy a tax for any purposes, during any year, which shall exceed one hundred per centum of the State tax for that year, unless such excess, whether levied by village, city or parochial authorities, *shall first be sanctioned by a vote of a majority of the said voters of said village, city or parish*, at an election held for that purpose. No *per capita* tax, except the poll tax authorized by the State Constitution, shall be assessed or collected in this State."

It is suggested by counsel for the relators that this act (No. 42) became a law subsequent to the school bill, and does not, therefore, affect or impair the right of the city authorities to act under the provisions of said school bill. If there be any force in this, the successful reply to it is that the same provision existed, as to cities, in the revenue law of 1870, and the prohibition, therefore, existed at the date of the passage of the school bill, and was simply continued or re-enacted in the act of 1871, the repealing section of which repealed only such laws or parts of laws as are contrary to or inconsistent with said act. See 22 An. 273.

It is next suggested that this section violates article 114 of the Constitution of the State, as it is not covered by the title to the revenue act, wherein it is found. In this view we can not concur. The phrase in the title "to levy and collect taxes," is direct and comprehensive enough to embrace the provisions of section seven, which relates unequivocally to the subject of levying taxes, cities, municipal corporations and parishes, subdivisions of the State, being prohibited from levying taxes beyond a certain per centum. And furthermore, it is a well established rule of legal construction that "the title of a law is not to be strictly construed; if it state the object according to the understanding of reasonable men, it satisfies the Constitution." 6 An. 605; 21 An. 752. Nor is it necessary that the title should define or

specify the particular provisions of each section—a rule which would make the title as long as the law, or would be the law, less the enacting words only. The title is sufficient.

But it is said the court will rather prefer to harmonize the provisions of both laws, to do which it is only necessary to apply the limitation, not to the aggregate of taxes which it may be necessary for the city to assess, but to the dimensions or amount of any one single tax of the several taxes which it is and was known the city required as the consolidated loan tax, the railroad tax, the park tax, the Metropolitan Police tax, etc. It is not difficult to perceive that this construction would totally destroy all limitation, and leave the law without a rational object; for, upon this theory, the city authorities might levy any number of specific taxes for particular purposes, provided each one did not exceed two per centum of the value of the taxable property. Such a construction is not allowable.

The law is free from ambiguity, and is manifestly enacted in the interest of the taxpayers and intended to limit, as it does, the taxing power of all municipal and parochial authorities to the will of the voters as to any and all taxation on property beyond two per centum of its value. If, however, such authorities deem an additional amount necessary for the public good, they have under this law only to submit the question to the legal voters of the respective localities for their decision.

Although judges are not to be controlled in their action by a consideration of the consequences which may flow from their exposition of laws, we can very properly say that we are unable to perceive the disastrous consequences which seem to be apprehended by counsel from the operation of this law. If the people of New Orleans desire the public schools in the city to be maintained by special taxation on their property, they will doubtless give their sanction to the levying of the additional tax necessary for such a laudable purpose, whatever may be the comparative importance of the objects for which the limit of taxation has already been attained. It is certainly not within the province of the courts to set aside the law for the purpose of sustaining even the free public school system.

Our conclusion is that a writ of mandamus can not properly issue in this case to compel the Board of Administrators to levy and collect a tax sufficient to realize the sum called for by the relators. The seventh section of the revenue act of 1871 has clearly limited the taxing power of the municipal government, and that power has already been exhausted; but said section has also provided a mode for raising any necessary tax beyond the prescribed limit, and that mode is not the one resorted to in this proceeding.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

Succession of Alexandre Labry.

No. 3245.—SUCCESSION OF ALEXANDRE LABRY, deceased—On Opposition to Tableau of Administrator.

Prior to the adoption of the constitution of 1868, the heirs of a deceased party had secured to them by law a tacit or legal mortgage on the property of the tutor or tutrix superior to all other mortgages of subsequent date. The executing of a bond for the faithful administration of the tutorship fixed the date at which the rights of mortgage attached to the property of the tutor in favor of the heirs; and a judgment of the court recognizing the mortgage rights in favor of the heirs, which omitted to fix the date at which the mortgage attached, did not thereby change or supersede the date as fixed by the bond. The recording of the tutor's bond, therefore, before the first of January, 1870, in pursuance to the provisions of the act of 1869, renewed and perpetuated the tacit mortgage which existed prior to the adoption of the constitution of 1868, without reference to the judgment against the tutor on the bond.

The act of 1869, which provides a mode of registry for all mortgages, which, before the adoption of the constitution of 1868, were not required to be recorded, makes no distinction in the mode of recording those mortgages which existed at the time of the passage of the law, and those which came into existence after that period.

A conventional mortgage, which only has existence as a mortgage from the date of registry, can only date and take rank from that period.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *A. Bouanchaud*, Parish Judge. *T. H. Hewes, John H. Ilsley, Cooley & Phillips, A. Provosty* and *S. J. Powell*, for opponents and appellants. *A. L. Mahondeau*, for appellees.

TALIAFERRO, J. The litigating parties in this case contest each other's claims to priority of mortgage right upon the proceeds of mortgaged property insufficient to pay all their debts against the succession. The administrator filed a tableau of distribution; which was opposed by Mathilde Laurans, whose claim to legal mortgage was postponed to the legal mortgage of Alexandre, Alexandrine and Joseph S. Labry, heirs of the decedent, Alexandre Labry. *A. Miltenberger & Co.* opposed the pretensions of these parties as unfounded, setting up their special mortgage as having priority over all others. After hearing these oppositions, the Parish Judge amended the tableau by allowing the claim of Joseph Severin Labry for \$3380 33, with legal mortgage, to take effect from the twenty-first of February, 1848. Alexandre and Alexandrine were awarded each a like sum, with judicial mortgage, to take effect from the twenty-first of December, 1866. The claim of Mathilde Laurans was allowed, but without mortgage. *A. Miltenberger & Co.* were ranked as creditors, having special mortgage dating from the second of April, 1861, for the sum of \$9470 20. From the judgment homologating the tableau as thus amended, all the parties, except Joseph S. Labry, have appealed.

The wife of Alexandre Labry, and mother of the three heirs—Alexandre, Alexandrine and Severin Labry—died in the year 1848. An inventory and appraisement was then made of her succession, and the surviving husband became the tutor of the minor children. An abstract from this inventory was recorded in the mortgage office of the parish of Pointe Coupée, in October, 1869, with the view of preserving

specify the particular provisions of each section—a rule which would make the title as long as the law, or would be the law, less the enacting words only. The title is sufficient.

But it is said the court will rather prefer to harmonize the provisions of both laws, to do which it is only necessary to apply the limitation, not to the aggregate of taxes which it may be necessary for the city to assess, but to the dimensions or amount of any one single tax of the several taxes which it is and was known the city required as the consolidated loan tax, the railroad tax, the park tax, the Metropolitan Police tax, etc. It is not difficult to perceive that this construction would totally destroy all limitation, and leave the law without a rational object; for, upon this theory, the city authorities might levy any number of specific taxes for particular purposes, provided each one did not exceed two per centum of the value of the taxable property. Such a construction is not allowable.

The law is free from ambiguity, and is manifestly enacted in the interest of the taxpayers and intended to limit, as it does, the taxing power of all municipal and parochial authorities to the will of the voters as to any and all taxation on property beyond two per centum of its value. If, however, such authorities deem an additional amount necessary for the public good, they have under this law only to submit the question to the legal voters of the respective localities for their decision.

Although judges are not to be controlled in their action by a consideration of the consequences which may flow from their exposition of laws, we can very properly say that we are unable to perceive the disastrous consequences which seem to be apprehended by counsel from the operation of this law. If the people of New Orleans desire the public schools in the city to be maintained by special taxation on their property, they will doubtless give their sanction to the levying of the additional tax necessary for such a laudable purpose, whatever may be the comparative importance of the objects for which the limit of taxation has already been attained. It is certainly not within the province of the courts to set aside the law for the purpose of sustaining even the free public school system.

Our conclusion is that a writ of mandamus can not properly issue in this case to compel the Board of Administrators to levy and collect a tax sufficient to realize the sum called for by the relators. The seventh section of the revenue act of 1871 has clearly limited the taxing power of the municipal government, and that power has already been exhausted; but said section has also provided a mode for raising any necessary tax beyond the prescribed limit, and that mode is not the one resorted to in this proceeding.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

Succession of Alexandre Labry.

No. 3245.—SUCCESSION OF ALEXANDRE LABRY, deceased—On Opposition to Tableau of Administrator.

Prior to the adoption of the constitution of 1868, the heirs of a deceased party had secured to them by law a tacit or legal mortgage on the property of the tutor or tutrix superior to all other mortgages of subsequent date. The executing of a bond for the faithful administration of the tutorship fixed the date at which the rights of mortgage attached to the property of the tutor in favor of the heirs; and a judgment of the court recognizing the mortgage rights in favor of the heirs, which omitted to fix the date at which the mortgage attached, did not thereby change or supersede the date as fixed by the bond. The recording of the tutor's bond, therefore, before the first of January, 1870, in pursuance to the provisions of the act of 1869, renewed and perpetuated the tacit mortgage which existed prior to the adoption of the constitution of 1868, without reference to the judgment against the tutor on the bond.

The act of 1869, which provides a mode of registry for all mortgages, which, before the adoption of the constitution of 1868, were not required to be recorded, makes no distinction in the mode of recording those mortgages which existed at the time of the passage of the law, and those which came into existence after that period.

A conventional mortgage, which only has existence as a mortgage from the date of registry, can only date and take rank from that period.

APPEAL from the Seventh Judicial District Court, parish of Pointe à Coupée. *A. Bouanchaud*, Parish Judge. *T. H. Hewes, John H. Ilsley, Cooley & Phillips, A. Provosty* and *S. J. Powell*, for opponents and appellants. *A. L. Mahondeau*, for appellees.

TALIAFERRO, J. The litigating parties in this case contest each other's claims to priority of mortgage right upon the proceeds of mortgaged property insufficient to pay all their debts against the succession. The administrator filed a tableau of distribution; which was opposed by Mathilde Laurans, whose claim to legal mortgage was postponed to the legal mortgage of Alexandre, Alexandrine and Joseph S. Labry, heirs of the decedent, Alexandre Labry. *A. Miltenberger & Co.* opposed the pretensions of these parties as unfounded, setting up their special mortgage as having priority over all others. After hearing these oppositions, the Parish Judge amended the tableau by allowing the claim of Joseph Severin Labry for \$3380 33, with legal mortgage, to take effect from the twenty-first of February, 1848. Alexandre and Alexandrine were awarded each a like sum, with judicial mortgage, to take effect from the twenty-first of December, 1866. The claim of Mathilde Laurans was allowed, but without mortgage. *A. Miltenberger & Co.* were ranked as creditors, having special mortgage dating from the second of April, 1861, for the sum of \$9470 20. From the judgment homologating the tableau as thus amended, all the parties, except Joseph S. Labry, have appealed.

The wife of Alexandre Labry, and mother of the three heirs—Alexandre, Alexandrine and Severin Labry—died in the year 1848. An inventory and appraisement was then made of her succession, and the surviving husband became the tutor of the minor children. An abstract from this inventory was recorded in the mortgage office of the parish of Pointe Coupée, in October, 1869, with the view of preserving

Succession of Alexandre Labry.

the legal mortgage, which these heirs held on the property of their tutor. Two of these heirs, Alexandre and Alexandrine, brought a suit against their father and former tutor for an indebtedness growing out of the tutorship, and obtained judgment against him on the twenty-first of December, 1866, recognizing their legal mortgage, but without giving it any date. The prescription of four years was pleaded against the claims of all three of the heirs on the alleged ground that four years had elapsed after they obtained the age of majority before they instituted proceedings for a settlement of their tutorship claims. Alexandre Labry, in 1851, became the tutor of Mathilda Laurans, one of the litigants, and executed his bond as her tutor on the twenty-fifth of November, 1851. This bond was duly recorded in the proper office before January, 1870, in order to preserve her legal mortgage. We find in the record a petition filed on the twelfth of December, 1861, by the under tutor of Mathilde, setting forth that her tutor had resigned, and prayed for the convocation of a family meeting to select a successor. The meeting, under an order of court, assembled on the twentieth of December, 1860, and advised the appointment of John Laurans, who was appointed and confirmed as tutor to Mathilde, who gave bond on the twelfth of January, 1861, Alexandre Labry, the former tutor, signing the bond as surety. John Laurans died in 1862. On the thirty-first of August, 1865, A. Provosty presented a petition setting forth the decease of Laurans, and representing himself as nearest of kin in the collateral line, prayed to be appointed tutor to Mathilde. He was appointed accordingly on the same day. Mathilde was emancipated by order of court on the fifth of April, 1866. Provosty, the last tutor, died since the commencement of these proceedings. There is nothing to show that Alexandre Labry ever rendered an account of his tutorship of Mathilde Laurans, and nothing to show that either Laurans or Provosty ever rendered an account. No written resignation or declaration in writing by Alexandre Labry is produced, showing that he resigned his office of tutor to Mathilde Laurans. It is contended on her part that none of the proceedings taken during her minority, affecting her rights, have released the property of Labry from the effect of her legal mortgage to secure his indebtedness to her as her tutor. Within the proper time after her emancipation she proceeded against the administrator of Labry, who died in 1869, for the rendition of an account. The tableau over which the parties are contending seems to have been presented under an order provoked by her.

The opponents of the Labry heirs have failed to establish against them the plea of prescription. We think the Judge *a quo* erred in allowing two of those heirs, Alexandre and Alexandrine, only a judicial mortgage to take effect from the twenty-first of December, 1866. It is true the judgment rendered in their favor against their former tutor,

while it accords to them a legal mortgage against his property, does not fix the date from which that legal mortgage took effect; but this omission is cured by the recording in the mortgage office an abstract from the inventory and appraisement of their mother's estate, as required by the act of 1869, prescribing the manner of preserving and continuing in force legal or tacit mortgages. Their right to a legal mortgage, dating and taking effect in 1848 on the property of their tutor, was preserved by complying with the requirements of the act of 1869, that right was not lost by the institution of the suit and the consequent judgment obtained against their tutor in 1865. By recording that judgment they acquired a judicial mortgage in addition to their legal mortgage.

We think there was error in the judgment, also, in placing Matnide Laurans on the tableau as an ordinary creditor for the amount of her claim without mortgage right. Alexandre Labry, Sr., was, as we have seen, appointed her dative tutor in 1851, and gave bond and security as required by law. To preserve her lien or legal mortgage she recorded, prior to the first of January, 1870, her tutors' bond, and this, we think, was sufficient. The act of the Legislature of March 8, 1869, providing the mode of preserving legal mortgages is, in several of its sections, not free from ambiguity and even obscurity; yet, taking it in its entirety, we think its purpose was accomplished. The sections two, eight and eleven, in connection, we think, warrant our conclusion that the recording of the bond suffices. Section two directs prospectively that before a tutor shall be appointed, the bond of such tutor shall be recorded? What is the object of the Legislature by this enactment? Plainly that the bond recorded shall operate as notice of the minor's legal mortgage. Then why should not the recording of a tutor's bond, which was given before the adoption of the constitution of 1868, operate as notice of a legal mortgage, existing from the date of the bond, provided that in this case the bond be recorded before the first of January, 1870? The act in question was passed in conformity with the direction given by the one hundred and twenty-third article of the State constitution, and this was "to provide, by law, for the registration of all mortgages and privileges." Legal mortgages, existing in favor of minors before the adoption of the constitution of 1868, were to continue to exist if recorded before the first of January, 1870. The Legislature was required to provide by law for the recording of all mortgages and privileges. Then it was incumbent upon the Legislature to provide for the recording of that class of mortgages which, prior to January 1, 1870, existed by operation of law without being recorded. The legal mortgage of minors before January 1, 1870, had the same character that mortgages of that kind, to come into existence after that period, were to have. They had all to be recorded to have

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effect—those in existence before January, 1870, were to be recorded before that time, and those springing into existence afterwards as they arose. Hence, the method adopted for recording applies as well to minors' mortgages that existed prior to January, 1870, as to those which were to originate subsequently. Minors' mortgages, in the case of natural tutors, are to be recorded by registering in the proper office abstracts or certificates showing the amount of inventory. In case of dative tutorship by recording the tutor's bond.

There was then no reason that there should be one method for recording minors' mortgages that existed before 1870, and another method for recording the same kind of mortgages that were to have their origin after that period. The article one hundred and twenty-three of the constitution recognized no distinction, and did not authorize the Legislature to make any in the manner of recording mortgages of the same class, whether existing prior to January 1, 1870, or to exist afterwards.

The ground assumed by the opponents of the claim of Mathilde Laurans that Alexandre Labry, her tutor, resigned his trust as her tutor, that other tutors succeeded him, and to them she must look for redress, can not be maintained. It is not shown that he ever resigned, and if he did, it is not pretended that he ever made any settlement of his accounts. Assuming that circumstances existed which authorized or excused him from a further discharge of his duties as her tutor, he still continued bound to render an account of the tutorship, a duty which he never performed. It is shown that large amounts went into his possession belonging to the then minor under his charge. The appointment of Laurans, and afterwards Provosty, as her tutor, by no means released Labry from accountability.

The tableaux as first presented in the Parish Court gave, in our opinion, the proper rank of the several creditors by mortgage and privilege, and we think it should assume its original form.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, that the tableau of the administrator be amended by placing thereon the heirs of Alexandre Labry, viz: Alexandre, Alexandrine and Joseph S. Labry as creditors, with legal mortgage, for \$14,184 05 to date and take effect from the twenty-first of February, 1848. Next, that Mathilde Laurans be recognized as a creditor, with legal mortgage to date and take effect from the twenty-fifth of November, 1851, for the sum of \$9151 92. Third—That A. Miltenberger & Co. take rank with special mortgage for \$9470 to date and take effect from the second of April, 1861, and that, as thus amended, the tableau be homologated and confirmed, the costs to be paid by the succession.

Succession of Alexandre Labry.

HOWELL, J., *dissenting*. I am unable to concur in the opinion of the majority of the court, that the recording of a tutor's bond, executed prior to the adoption of the constitution of 1868, preserves the mortgage in favor of the minor.

I find nothing in sections two, eight and eleven, of act No. 95 of 1869, which authorizes or directs the recording of such bonds, or gives the recording of them such effect. The bonds which are to be recorded are those given by tutors appointed after the passage of the law; and it is a well settled doctrine that we can not extend the effect of the registry of mortgages or laws providing for registry by implication or inference. It may be a legislative omission, but we can not, I think, supply the omission.

Rehearing refused.

No. 2357.—CITY OF BALTIMORE *v.* HENRY PARLANGE—GEORGE MERZ,
Third Opponent.

A contractor, who repairs or reconstructs a building whereby the land or lot of ground on which it stands, is enhanced in value, has the same lien and privilege on the building, which the law accords to a contractor on a new building. Where, therefore, the vendor seeks to enforce his lien on the lot of ground for an unpaid portion of the price, the contractor who has made repairs on, and reconstructed the buildings thereon since the sale, may cause a separate appraisement of the buildings from that of the land to be made, and enforce his lien on the buildings, which is superior to that of the vendor's lien on that part of the valuation which is estimated to be in the buildings.

APPEAL from the Fifth District Court, parish of Orleans. *Leau-mont, J. Semmes & Mott*, for plaintiff and appellee. *Hornor & Benedict*, for defendants and appellants.

HOWE, J. This case involves a conflict of privilege between the vendor of lands and the contractor who has, after the sale, repaired or reconstructed the buildings which were on the lands.

In 1859 the city of Baltimore sold to Parlange the lots in question, fronting respectively on Orleans and St. Ann streets, a theatre and ball room, reserving a vendor's privilege and mortgage, with the pact of non-alienation, to secure the unpaid portion of the price.

In 1869 the city of Baltimore took proceedings to collect an unpaid portion of the price, and to enforce its privilege and mortgage, and the property was seized and advertised for sale by the sheriff.

George Merz filed his opposition, claiming, as transferee of Samuel Johnson, a privilege for work done in 1867, under recorded contract, in erecting, repairing and renovating the buildings on the lots which had in the meantime become the property of Bernard Avegno. The work seems to have been rendered necessary by a fire which had occurred on the premises a short time before.

A rule was taken by Merz for a separate appraisement of lands and buildings under the article (3235) of the Code, which prescribes that

effect—those in existence before January, 1870, were to be recorded before that time, and those springing into existence afterwards as they arose. Hence, the method adopted for recording applies as well to minors' mortgages that existed prior to January, 1870, as to those which were to originate subsequently. Minors' mortgages, in the case of natural tutors, are to be recorded by registering in the proper office abstracts or certificates showing the amount of inventory. In case of dative tutorship by recording the tutor's bond.

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A rule was taken by Merz for a separate appraisement of lands and buildings under the article (3235) of the Code, which prescribes that

when the vendor of lands finds himself opposed by workmen seeking payment for a house or other work erected on the land, a separate appraisement is made of the ground and of the house, the vendor being paid to the amount of the appraisement on the land, and the other to the amount of the appraisement of the building.

It appeared on the trial of the rule that the building on the portion of the property fronting on St. Ann street had been entirely erected under the Johnson contract, and as to this the judge *a quo* ordered a separate appraisement, the propriety of which is not in dispute. As to the portion of the property fronting on Orleans street, the rule was dismissed on the ground, it seems, that the privilege of the contractor and the separate appraisement could not be applied in such a way, in favor of one who had merely made *repairs*, as to encroach on the fund coming to the vendor. From this decision Merz appealed.

The testimony on the rule is not very satisfactory, and would doubtless be made more exact on a regular trial of the opposition. Johnson, the principal witness says, however:

"I repaired the old Orleans ball room and rebuilt the buildings on St. Ann street. They were new buildings. The building on Orleans street was almost rebuilt from the ground up. Those buildings had been burnt almost to the ground. Some parts had to be built from the foundation; had to put foundations in some places. Fully one-half of the whole contract money was expended on the Orleans street building. The place was a wreck."

From this we judge that the repairs on the Orleans street property were necessary and extensive, amounting well nigh to rebuilding. It seems clear that they must have added greatly to the value of the premises which, without them, would not be likely to bring more than the price of vacant property.

The privilege in favor of the contractor is one which exemplifies the intelligent sense of justice which distinguishes the civil law. It is founded on the equitable theory that he who has by his labor or expenditure increased the value of a thing pledged for the payment of a debt, should not be omitted in the distribution of the proceeds of that thing. Dig. 20, 4. *Qui potiores*, etc. By article 2103 of the Code Napoleon this privilege for *repairs*, no less than for building and rebuilding, is recognized; and the commentators seem to agree that it is not primed by that of the vendor; but is to be exercised in such a way as to give the contractor the benefit of the increased value he has given to the property. Duvanton, vol. 19, No. 148 to 199; Delvencourt, vol. 3, p. 154; Merlin, Rep. vol. 13, p. 254; Persil, Priv. et Hyp., vol. 1, p. 213.

The practical details of the French system differ from ours, but the principle of justice is the same. By article 3216 of the La. Code the

City of Baltimore v. Parlange.

privilege of contractors employed in constructing, rebuilding or repairing houses and buildings, or making other works on such houses, buildings or works, by them constructed, rebuilt or repaired, is fully recognized. By article 3235 a separate appraisement is provided for when the vendor finds himself opposed by workmen seeking payment for a house or other work erected on the land. We are of opinion that the rule of this latter article may be justly applied to find the *pro rata* of proceeds due to the maker of such necessary repairs as have added value to the thing pledged. In adopting this view we do not, as objected by counsel, extend a privilege by implication. The privilege clearly exists by article 3216. It is on the building merely, not on the land. We merely follow the rule of article 3235 (a rule which would probably exist without the article), in ascertaining as best we may the proportion of proceeds due to creditors equally meritorious.

Nor does the pact of non-alienation prevent the subsequent contractor from acquiring a privilege. This point was settled in *Jamison v. Barelli*, 20 An. 453.

Nor do we perceive that the fact that Parlange agreed to keep the buildings insured for a certain sum can affect the question.

It is therefore ordered that the judgment appealed from be reversed, and that the rule for a separate appraisement, taken by appellant, be made absolute, plaintiff to pay costs of appeal.

No. 2377.—C. T. BUDDECKE & Co., Agents, v. H. A. SPENCE—C. E. SLAYBACK & Co., Intervenors.

The act of the General Assembly of 1841, amending article 3214 of the Civil Code and giving to the consignee, commission agent and factor a privilege and preference over the attaching creditor on the goods consigned, is not repealed or modified by the act of March 28, 1867, amending article 3184 of the Civil Code, in reference to privileges on certain movables.

The fact that the consignor gives the consignee notice in writing at the time the goods are shipped that he intends to draw on him, does not impair, destroy or postpone the privilege given by law on the goods shipped for any balance that may be previously due him. In this respect it makes no difference whether the indebtedness results from advances made on the goods shipped or not.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Buddecke & Upton*, for plaintiffs and appellants. *Randolph, Singleton & Browne*, for defendants and appellees.

HOWE, J. The plaintiffs, as agents of the Fourth National Bank of St. Louis, commenced this action against the defendant, Spence, a resident of Missouri, and attached a shipment of grain consigned by steamer Thompson Dean to C. E. Slayback & Co., of New Orleans.

Slayback & Co. intervened, claiming that the grain had been consigned by Spence to them as commission merchants for sale; that bills of lading in which they were named as consignees had been regularly

issued and received by them long prior to the arrival and attachment of the goods; that Spence was indebted on balance of account to them as his commission agents in a large sum, for advances made on previous shipments; and that they had a special property in the goods and a claim or privilege on them superior to that of plaintiffs as attaching creditors.

The decision of the lower court was in favor of the claims of intervenors on the point of privilege, and plaintiffs have appealed.

They make two points in this court:

First—That the act of 1841, amending article 3214 of the Civil Code and giving the consignee, commission agent and factor a privilege in preference to the attaching creditor on the goods consigned to him for any balance due him, whether specially advanced on said goods or not, has been repealed by the act of March 28, 1867, amending article 3184 of the Civil Code, in reference to the privileges on certain movables. We can not assent to this proposition. The two sections are entirely independent in their action, and an amendment of one does not, in itself, affect an amendment to the other.

Article 3184 is under one section, entitled, "Of the Privileges on Particular Movables;" article 3214 is under another section, entitled "Of the Privilege on Ships and Merchandise." The furnisher of plantation supplies and his privilege on the crop, mentioned in article 3184, are one thing; the consignee of goods from St. Louis and his privilege for balance due as against the attaching creditor, mentioned in article 3214, another thing.

Second—The plaintiffs further insist that inasmuch as when Spence shipped the goods and sent the bills of lading to Slayback & Co. he wrote at the same time, "I may need some money to-morrow; suppose you can accommodate me," therefore Slayback & Co. were notified of the fact that the proceeds of these shipments had, by the shipper, been disposed of in favor of third parties; that the consignments were conditional, made upon condition that their acceptance should be followed by the acceptance of the bills sued on, and that until the performance of this condition, Slayback & Co. could acquire no right to the goods so consigned. It should here be stated that the plaintiffs sue upon drafts drawn by Spence on Slayback & Co., which the latter refused to accept. In discounting these drafts it is clear from the testimony that the bank did not rely on any security except the honesty and solvency of Spence. The bank has no privilege on the grain or its proceeds; and we are at a loss to see how the expression in the letter of Spence, quoted above, could impair the privilege accorded by law to Slayback & Co. Spence shipped his grain here, consenting that it should fall into the clutches of this privilege. How can his ordinary creditor, the bank, complain?

Judgment affirmed.

Howard, Prestons & Barrett v. Branner.

No. 2367.—HOWARD, PRESTONS & BARRETT v. GEORGE M. BRANNER.

If a promissory note be dated in Tennessee and made payable in New Orleans, and there is no stipulation as to the rate of interest, the rate of interest will be determined by the law of Louisiana.

A PPEAL from the Fourth District Court, parish of Orleans.
Théard, J. R. & H. Marr, for plaintiffs and appellees. *Leovy & Monroe*, for defendant and appellant.

HOWE, J. Suit on a promissory note made by defendant. Defense, a general denial, want of consideration and misrepresentation by plaintiffs. Judgment for plaintiffs and appeal by defendant.

The defense does not appear to be established by the evidence, but we think there is a small error in the judgment in giving interest upon the note at the rate of six per cent. per annum, according to the law of Tennessee. It is true the note was dated in Tennessee, but it was by its terms made payable in New Orleans. In the absence, therefore, of any express stipulation as to the rate of interest, the rate is determined by the law of Louisiana. 13 L. 92; 8 N. S. 34.

It is therefore ordered that the judgment appealed from be amended by reducing the rate of interest therein provided to five per cent. per annum; that, as thus amended, the judgment be affirmed, and that plaintiffs pay costs of appeal.

No. 2709.—SUCCESSION OF H. F. MCKENNA.

If the appeal be granted on motion and the bond be given in favor of the clerk, all persons having an interest are by law parties to the appeal. If, therefore, the executor has a right to appeal in any capacity, the appeal taken by him will not be dismissed on motion of the legatees, who have not appealed, on the ground that the executor had no right to take an appeal for them.

An executor who is directed to administer the estate in conformity to the dispositions of the will, has an appealable interest from a judgment recognizing the rights of the survivor in community. The appeal taken by the executor from such judgment will not, therefore, be dismissed for want of appealable interest.

If a man who is domiciled and has his residence in Louisiana, marries a woman in a foreign country, without changing his residence or domicile, but continues to reside here, the property acquired subsequently to and during the marriage becomes community property, although the wife has never resided in the State, because the domicile of the wife is that of the husband.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Simeon Belden*, Attorney General, and *Thomas Hunton*, for appellants. *J. Ad. Rozier* and *Lea, Finney & Miller*, for appellees.

HOWELL, J. The motion to dismiss is based on the grounds:

First—That the executor is without authority to prosecute this appeal on behalf of or for the benefit of the legatees, who have not appealed and have not been made parties as appellants.

Second—The executor is without interest in the matters in controversy to authorize an appeal by him.

Third—The legatees have not made themselves parties to the mortuary proceedings in the lower court, and the proceedings had by the executor are unauthorized.

I. As to the first ground, it need only be said that the appeal having been granted on motion, and the bond being in favor of the clerk, all persons having an interest are by law parties to the appeal, and it is immaterial whether the legatees are appellees or appellants if the executor has a right of appeal in any capacity.

II. The appeal is taken from a judgment sustaining, in part, certain oppositions to the account filed by the executor, and by which one-half of the funds in his hands were assigned to the widow in community, and thus, as contended by the executor, taking away a large portion of the succession and rendering him unable to carry out the provisions of the will, which is the law governing his official action, and which it is his duty to execute.

This discloses an appealable interest. The funds in the hands of the executor are the proceeds of property inventoried as all belonging to the succession of the deceased, and sold, as shown by the record, to satisfy a judgment obtained by a trustee in behalf of the widow and pay the legacies made in the will, and it seems to be clearly the duty of the executor to account for the whole succession coming into his control, and to prevent any part of it from being diverted or appropriated in a way different from that provided or ordered by the will; and this whether the parties who may eventually be affected by such diversion complain or not, for the executor represents the deceased, and is under an official responsibility to see that the bequests and directions of the will are properly and faithfully carried out. His interest in executing the will is different from the interest or obligation of a syndic or administrator in the matter of distributing funds among creditors. The one derives his office and trust from the testator, and the other from the law.

In this case it appears that the succession has been open and under the administration of an executor since April, 1864, and it is only in the opposition to this account in August, 1869, that the widow has asserted any rights to the community, and if the executor considered the judgment recognizing those rights erroneous, it was his duty to have it revised. This claim is not set up as distributor under the will, but one alleged to grow out of the law of this State regulating the community between husband and wife, and which may result in materially affecting the dispositions made by the executor.

The cases cited by appellees are where administrators or syndics were considered mere stakeholders, having no interest in the fund, apart from their commissions, except to pay it to those to whom, upon being called together, they were ordered by the court to pay; while

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in this case the executor is ordered by the testator to dispose of all his estate in certain fixed sums to certain named legatees, and the claim preferred by the widow, he contends, will take out of his possession one-half of that estate. His appealable interest under such circumstances is manifest, and as real as that of a State or city treasurer in seeing that payments which they are ordered to make are correct.

We think the interest and duty of the executor in the matter are plain.

III. The application of the third ground is not perceived as a reason for dismissing the appeal. The filing of an account did not depend on the legatees making themselves parties to the mortuary proceedings. The law makes it the duty of executors to render annual accounts of their administration. C. C. 1674 [1666].

The motion is refused.

ON OPPOSITIONS TO ACCOUNT OF EXECUTOR

HOWELL, J. The executor's account shows a cash fund on hand of \$23,781 03, out of which he proposes to pay privileged debts against the succession, consisting of executor's commissions, attorney's fees and sheriff's and clerk's costs, amounting to \$4702 02, and a judgment of the United States Circuit Court in favor of E. McSwiney, trustee of Mrs. McKenna, which, with interest and costs to date of filing, is stated to amount to \$71,669 63, leaving a balance of only \$7409 38 to be distributed *pro rata* among the particular legatees, thirteen in number, whose legacies amount to \$75,000.

To this account oppositions were filed by Mrs. McKenna, claiming one-half of the funds in hand as widow in community, asserting that the judgment in favor of her trustee must be paid out of the funds belonging to the succession, that is, the portion of the husband and not the community, and objecting to the items of executor's commissions and payment of the particular legacies; also by McSwiney claiming interest as allowed by his judgment up to date of payment, and by the State of Louisiana claiming ten per cent. on all the legacies made by the deceased to persons not citizens of the United States and domiciled in this State at the date of his death.

The opposition of Mrs. McKenna, as widow in community, seeking to restrict the payment of the judgment of the United States Circuit Court to the portion of the funds belonging to the succession, was sustained, and in other respects dismissed; that of McSwiney was sustained, and that of the State as to a particular legacy of \$25,000 to the widow was dismissed; and as to other legacies, there being no funds, the right of the State was reserved. From this judgment the executor and the State appealed.

The executor presents four propositions for our consideration :

First—That Mrs. McKenna is bound by her unqualified receipt of the legacy of \$25,000 (less ten per cent.), on the nineteenth March, 1867, to observe and abide by the consideration imposed by the testator, to wit: “that she gives a full acquittance against any other claim on his estate.”

To this the reply is that by a codicil to the will, duly probated, the testator distinctly dispensed with or removed this condition.

Second—That Mrs. McKenna was not a partner in community, and if she were she is not entitled to participate in the large amount realized from the sale of property in Missouri, because that property was not acquired in Louisiana, was not acquired since 1852, and was not acquired by “non-resident married persons.”

It appears that Hugh F. McKenna, a merchant of New Orleans, was married in England in October, 1844, and retained his domicile here until the date of his death in February, 1864; that his wife never came to this country during his life, but resided in Europe; that in 1861, being in bad health, he left for England, and notified his wife, then in Belgium, to meet him in London, which she did; that they thereafter remained together, traveling in different parts of Europe, and that he died in London without forced heirs, having made the codicil to his will, above referred to, in August, 1861, after meeting his wife in that city.

We think it clear that under this state of facts, according to our law, the domicile of the wife was that of the husband, in New Orleans, and that a community of acquêts and gains existed between them, and that it is unnecessary to inquire into the motives or causes of the wife's continuing in Europe after the marriage.

Under the circumstances, we can readily presume that the husband consented for his wife to remain in Europe. In the will made by him before leaving here in 1861, he provided for her, giving her, besides the above legacy of \$25,000, four-tenths of the residue of his estate. Louisiana being the place of his domicile, and necessarily hers, at and subsequent to the marriage, the law of this State regulated the marital rights, and there being no separation of property between them, all the property acquired by them, or either of them, after marriage fell into and belonged to the community, unless shown to have been the separate property of one or the other. C. C. 39, 2332, 2334, 2402.

As to the property alleged to be in Missouri, it appears from the tableau to have been *stock* in a sugar refinery in that State held by the deceased. From this description we can only infer that the stock was an incorporeal, not having the character of an immovable by nature, or by the disposition of the law, and must be considered a movable. C. C. 471, 475.

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Third—That the judgment of the United States Circuit Court was based on a contract absolutely null and prescribed, and the rights of all parties in interest are reserved by the Second District Court, parish of Orleans, with reference thereto.

This judgment is in evidence, is against the executor, and must in this proceeding have the force of *res judicata*. We are without authority to revise it.

Fourth—That if said judgment is valid, still Mrs. McKenna, for whose use it was obtained, has no right to claim interest thereon, and also one-half of the estate. In other words, she could not suffer the amount agreed to be paid by McKenna by the marriage contract to remain in his hands, and be used by him in accumulating an estate, and then claim interest on the amount and one-half of the accumulations also. This would be to receive interest twice.

The judgment appealed from allows interest as awarded by the judgment of the United States Circuit Court from twenty-fourth January, 1864. It is a part of said last judgment, and binding on the executor.

Upon the appeal by the State we are not favored with a brief or argument by the Attorney General, and as we have allowed Mrs. McKenna her claim upon the fact of her domicile being in Louisiana, it seems a consequence that the ten per cent. tax can not be required of her because of having her domicile in Europe. She can not be considered a resident of Louisiana for the purpose of acquiring, and a resident of Europe for paying a per centage on her acquisition. We see no reason for disturbing the judgment.

Judgment affirmed¹

No. 3110.—D. REDMOND *v.* B. L. MANN and Mrs. L. L. MANN.

An application to the Supreme Court to extend the time fixed in the order of appeal by the lower court is without effect if not made within three judicial days after such return day. After the right of appeal has lapsed through the fault or negligence of the appellant, the Supreme Court can not legally take cognizance of the appeal.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. John W. Addison*, for plaintiff and appellee. *T. & J. Ellis*, for defendants and appellants.

HOWELL, J. A motion is made to dismiss, on the ground that the appeal was not brought up within the legal delay, and an extension of time was not applied for until six judicial days after the return day.

The order of appeal was granted on the twenty-fifth November, 1870, and it merely made the appeal "returnable according to law," not naming the return day. No objection is raised on this ground, but the order is treated by the appellee as sufficient. The objection is, and it

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appears to us to be a good one, that the appellants have not complied with it, because by section one of act No. 45 of 1870 (page 99), appeals from the parish of Tangipahoa are returnable on the first and third Mondays of each month of the session, and by section four of said act the return day, according to the order in this case, was the first Monday of December, and if there was not sufficient time to give the motion required by law and prepare the record by the said first Monday, then the third Monday (nineteenth) of December, at farthest, might be deemed the return day, and it was the duty of the appellants to apply to the Supreme Court (which was in session on that day) within three judicial days thereafter for an extension of time, or it was their duty to make their said application within three judicial days after the first Monday (fifth) of December, 1870, the legal return day under the order of the court, whereas it was not made until the twelfth of January, 1871, at least five or six judicial days after the third Monday of December, and at which time the appeal had lapsed, and consequently the order of extension was ineffectual, not being competent to revive the right of appeal lost by mere delay. The rule that when an act is to be done within a given time it may be done afterwards, if nothing occur to prevent it, does not apply to such a case. 8 L. 206; 6 R. 79; 9 An. 21.

We are constrained to hold that the appellants have been guilty of *laches* in not bringing up their appeal within the legal delay, and the appeal must be dismissed, not because of any defect in the order of appeal, but because, taking said order to be regular, and not in violation of the law, the appellants have not obeyed it, and have not taken the steps necessary under the law to bring up the appeal within the delay fixed by the order of appeal.

It is therefore ordered that the appeal herein be dismissed, with costs.

No. 3372.—SUCCESSION OF J. J. BERGOLD.

The order of the Supreme Court granting an extension of time to the appellant to bring up the appeal has no effect if the return day has expired before the application for the extension of the time is made to the court.

APPEAL from the Parish Court of Tangipahoa. *Bradley*, Parish Judge. *Dirhamer & Kennard*, for appellant. *T. & J. Ellis*, for appellees.

HOWELL, J. The order of appeal herein was granted on the fifth of December, 1870, and the appeal made returnable according to law. By the act of 1870, page 99, appeals from the parish of Tangipahoa are returnable on the first and third Mondays of each month of the term. The record was not filed until nineteenth April, 1871. It seems that

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on twenty-seventh March an extension of time to bring up the appeal was granted. The application was too late, as it should have been made in December, 1870, or at farthest, in January, 1871, and the order of extension could not revive the right to complete the appeal which had lapsed.

The motion to dismiss, based on these facts, must prevail, as just held in *Redmond v. Mann et al.*

It is therefore ordered that the appeal herein be dismissed, with costs.

No. 2385.—STATE, ex rel. JAMES F. ARD, v. HENRY H. BANKSTON.

Where a case involving the right to office is tried in chambers and an appeal is taken by motion, in open court, citation of appeal is not necessary.

If the appeal bond embraces all the parties necessary to the appeal, the fact that the order of appeal fails to set out the proper parties is not good cause for dismissing the appeal.

The failure of the order of appeal to fix a return day is not good cause for dismissing the appeal, because the fault is not attributable to the appellant.

The fact that the transcript was not filed until fifteen days after the judgment of the court below, in suit involving a contest for office, does not lay the foundation for a motion to dismiss the appeal.

In a contest for office where each one of the contestants holds his commission from the Governor of the State, with no evidence before the court showing that a vacancy has occurred in the office, and no evidence *dehors* the commissions is offered which contradicts their recitals, the contestant who holds the commission first issued will be declared entitled to continue in the office.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Bolivar Edwards*, District Attorney, and *Wilson & Perrin*, for relator and appellant. *T. & J. Ellis*, for defendant and appellee.

ON MOTION TO DISMISS APPEAL.

HOWE, J. The defendant, appellee, has moved to dismiss this appeal on the grounds:

First—That the appeal having been taken by motion, *at chambers*, there is neither petition nor citation.

Second—That the order of appeal does not fix any place to which it shall be returnable, nor return day.

Third—That the record of appeal was not brought up in time (the right of office being involved), the judgment having been signed May 7, 1870, and the transcript filed May 23, 1870; and

Fourth—That the State, co-plaintiff, is not made a party to the appeal.

The case was tried in chambers under the provisions of the intrusion act of 1868. The court was duly open and the motion of appeal was made on the same day the judgment was read, "in open court," and no citation was necessary.

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If it be a defect that the order does not fix a time and place, it is not attributable to the appellant.

The fact that the *transcript* was not *filed* till fifteen days after judgment in the court below, does not lay a foundation for a motion to dismiss.

The State was made a party to the appeal by the appeal bond in favor of the clerk. All possible parties are brought before us in this way.

Motion to dismiss overruled.

ON THE MERITS.

TALIAFERRO, J. This is an action brought under the "Intrusion Act." The relator avers that he was duly appointed sheriff of the parish of Tangipahoa by the Governor of the State and was confirmed by the Senate on the sixteenth of March, 1870, and in accordance with this appointment he holds the proper commission issued to him on the same day; that he has duly qualified as sheriff by taking the oath and furnishing the official bond required by law; that notwithstanding his legal right to hold the office and discharge the duties appertaining to it, he is obstructed and prevented from so doing by one Henry H. Bankston, made defendant herein, who pretends that he is the sheriff of said parish, and that he unlawfully holds and controls the said office of sheriff, retaining from the possession of the relator the archives, books, papers and appurtenances of the office. He prays judgment against the defendant as an intruder into the office aforesaid; that he be decreed to be unlawfully acting in the capacity of sheriff of said parish; that he be ejected and excluded therefrom; that relator be put into possession of the office and maintained in the peaceable exercise of the duties thereof; that he recover from defendant two thousand dollars damages for his tortious and illegal acts and for all costs of this proceeding.

The answer is a general denial. The defendant specially alleges that the relator is disqualified by the fourteenth amendment of the Constitution of the United States to hold office; avers that he is himself the duly appointed, commissioned and qualified sheriff of Tangipahoa parish, appointed thereto and commissioned on the ninth of March, 1869, in pursuance of the act of the Legislature of the sixth of the same month, establishing the said parish; that by the provisions of said act the Governor was authorized to appoint the parish officers of the new parish, and their term of office was made to extend to the next general election then next ensuing. There was judgment in favor of the defendant and the relator has appealed.

The point which the relator strives to make is, that the appointment

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of Bankston on the ninth of March, 1869, continued only to the end of the next session of the Legislature; and he avers that when it was made the Senate was not in session to confirm nominations, the Legislature having adjourned *sine die* nine days before; that there was, therefore, a vacancy in the office, which arose at the end of the regular session of the Legislature, about the first of March, 1870; that the relator was appointed on the sixteenth of that month, during the extra session of the Legislature called immediately after the termination of the regular session that preceded, and that his nomination was confirmed by the Senate during the extra term. There is no difference between the commissions except in their dates and the names of the appointees. Both commissions recite that the appointments were made by and with the advice and consent of the Senate. There is no evidence *dehors* the commissions contradicting their recitals, and we are not authorized to take judicial cognizance, without proof, of the legislative transactions recorded in its journals in order to ascertain the truth of the fact as to whether confirmations were made by the Senate of the persons purporting, by these commissions, to have been appointed. In the entire absence of anything showing that there has been a removal from office of the party first appointed or that the office had, from any cause, become vacated before the date of the last commission, we can only presume the last commission was issued in error, and must, therefore, maintain the defendant in the right he sets up to the office in virtue of his holding the older commission. This case differs from the case of *George v. Tucker*, 23 An.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs in both courts.

No. 2162.—E. G. COOK v. A. MILTENBERGER & Co.

The written promise to accept an existing bill is an absolute acceptance which is binding on the party who makes it; therefore, if a party promise in writing to accept drafts drawn upon him by the collector of internal revenue for the amount of taxes imposed upon him on account of cotton received, he is bound on such drafts, and can not be heard to urge that the laws of the United States prohibit tax collectors from collecting taxes in any thing but lawful money. Nor can he be allowed to urge that no one but the United States is entitled to recover.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. J. M. Bonner*, for plaintiff and appellant. *Campbell, Spofford & Campbell*, for defendants and appellees.

HOWELL, J. Plaintiff, Collector of Internal Revenue for the First District of Mississippi, sues the defendants upon six drafts, drawn by C. F. Caruthers & Co., of Osyka, Mississippi, in pursuance of the following letter of defendants, dated October 26, 1866: "We have no objection to your drafting upon us in payment of the internal revenue

tax on cotton shipped to us. Your drafts for same will therefore be duly honored." This was in reply to the following from said Caruthers & Co., of October 24: "Please to inform us whether it would suit you if we were to give a draft on you for the internal revenue tax, the collector here preferring same instead of money." The drafts amount to \$2790, are dated, the first on October 27, payable at ten days, the second on November 10, at sight, the third December 3, at sight, the fourth December 15, at sight, the fifth December 24, (1866), at sight, and the sixth January 28, 1867, at sight, and were protested April 11, 1867. The defendants except that there is no cause of action, because the laws of the United States prohibit the collectors from collecting taxes in any thing but lawful money, and if any party is entitled to recover it is the United States; and for answer they allege that they had no notice of said drafts until after the account of the drawers was closed and settled; that said drafts are largely in excess of any shipments to defendants; and that the non-presentment by the holder, the failure to give notice by the drawers, the time given to the latter, and the violation of the act of Congress, have released defendants, who plead illegality, collusion, fraud and want of interest in plaintiff. The exception was maintained, and plaintiff appealed.

The laws of Congress, invoked by defendants, are enacted in the interest of the government of the United States, and can not avail as a defense to this action on behalf of defendants, who are liable, if at all, on their agreement to accept commercial paper, given for the amount of the revenue tax on cotton shipped to them. See 1 Brightley Dig., pp. 887, 888, §§ 50, 57, 58, 59, 60, 66; 13 Stat. at Large, p. 400, §§ 25, 51; 14 Stat. at Large, p. 98, §§ 1 and 2.

There is ample proof that defendants were notified of each draft as drawn and promised to pay them, and that they were drawn for the tax on cotton shipped to defendants, in accordance with their authorization of October 26, 1866. Their subsequent settlement with the drawers, without including or providing for the same, was at their own risk, so far as the holder is concerned. The written promise to accept an existing bill is an absolute acceptance, and nothing but payment or a release can exonerate such acceptor. Story on Bills, §§ 244, 254; Parsons on Notes and Bills, vol. 1, p. 324. There was a written promise on the part of defendants to honor each one of these drafts in addition to the first letter agreeing to do so.

Under the circumstances they must be held liable.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of defendants, A. Miltenberger and G. Miltenberger, *in solido*, the sum of \$2790, with legal interest from April 11, 1867, and costs in both courts.

Rehearing refused.

Morano v. Shaw et al.

No. 2369.—VICTOR MORANO v. ALFRED SHAW et al.

The vendee of a purchaser at sheriff sale, though expressly subrogated to all the rights and privileges acquired by his vendor under the sheriff sale, has no right of action against the recorder of mortgages for having given an imperfect and erroneous certificate, whereby his vendor was induced to purchase property charged with incumbrances not made known at the time of the sale. The action for damages against the recorder for omitting to give a full and complete certificate of the incumbrances on the property to be sold is a personal one, and can, therefore, only be exercised by the purchaser at sheriff sale.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. St. M. Berault* and *A. & P. J. Robert*, for plaintiff and appellant. *Clarke, Bayne & Renshaw* and *E. Bermudez*, for defendants and appellants.

This case was tried by a jury in the court below.

TALIAFERRO, J. The object of this suit is to render a recorder of mortgages liable in damages for having furnished a mortgage certificate by which the sheriff of the parish of Orleans sold under execution certain lots of ground as being free from all liens and incumbrances whatever, when in fact there existed a mortgage for a large sum against the property, which mortgage was, subsequent to the plaintiff becoming the owner of the lots sold at sheriff sale, enforced against them, to his great detriment and injury. The plaintiff joins in this action his vendor, Daniel Martin, who was the purchaser of the property at the sheriff's sale, and who sold it to the plaintiff with full warranty in all respects. Martin answered, averring that in an injunction suit instituted by the plaintiff against the party enforcing the mortgage complained of, the plaintiff had the means of defeating it, but failing to do so and abandoning the injunction proceeding, he lost all recourse upon him in warranty.

The defendant, Shaw, pleads the prescription of one, three and five years; that the plaintiff has no right of action against him; and avers that the plaintiff has entered into a fraudulent combination with others to extort from him a large sum under the pretext of damages that, had the plaintiff given him reasonable notice of the proceedings taken against the property purchased as alleged by the plaintiff, and which was sold under an older mortgage, not specified in the certificate of mortgage, he could have pointed out available defenses which the plaintiff might have resorted to and protected himself.

The cause was tried before a jury, which rendered a verdict against the defendant, Shaw, for the sum of \$4500. From the judgment thus rendered he appealed. From that part of the judgment releasing Martin, the plaintiff appealed.

The facts of the case are that the city of New Orleans, in its administration of the McDonogh school fund, sold to our Gubernator four

lots of ground in a specified locality in the city, the lots being designated by the numbers one, two, three and six. The sale was made on a credit; notes were given, and a special mortgage upon the property retained. Subsequently White, a paver, having a claim amounting to several hundred dollars against Gubernator for paving in front of some of these lots, brought suit against him, claiming a privilege upon the lots. He had judgment for the amount he claimed, with recognition of privilege. The lots were offered for sale under execution, and two of them, lots one and six, were sold, Daniel Martin being the purchaser. It was at this sale that the property was declared to be free of incumbrances, the recorder of mortgages having omitted to name in his certificate the mortgage in favor of the city of New Orleans given by Gubernator to secure the payment of the price of the property. Martin sold these lots to Morano, the plaintiff, with full warranty against all incumbrances, a mortgage certificate being appended to the act of sale, and therein recited that the property was unincumbered. Afterwards the city sued Gubernator on his notes for the price of these lots, and under a judgment against him recognizing the mortgage claimed, the lots were seized by the sheriff and advertised for sale. The plaintiff in this suit, Morano, took out an injunction to prevent the sale, alleging ownership, and praying damages for the seizure. The injunction was dissolved, with twenty per cent. damages. The plaintiff in injunction applied for and obtained an order granting an appeal, but the appeal was abandoned. The claim of the city against Gubernator, it seems, was settled, and the property was not sold under execution. The sheriff's return on the execution recites that the debt was paid by Gubernator and that the writ was finally returned twenty-ninth August, 1867. Still, an alias *fieri facias* was issued on the eighth of February, 1868, and lots numbered two, three and six were again seized and were advertised for sale on the twenty-eighth of March, 1868, although it appears no sale was made. Pending this advertisement, Shaw, the defendant, wrote, under date of March 23, 1868, to both Daniel Martin and Morano, five days before the time fixed for the sale, suggesting available defenses that might be resorted to by them. It is shown that certified copies of these letters were served respectively on Daniel Martin and Morano the same day they were dated.

It appears by a notarial act dated seventh of May, 1867, that Gerard Stith, President of the Board of Commissioners of the McDonogh school fund, in consideration of the sum of \$3943 received from Francis Martin, assigned to him all the right, title and interest of the said commissioners in and to the judgment obtained by the city of New Orleans for the use of the McDonogh school fund against Gubernator, and subrogated him to all their rights in the said judgment and the notes upon which the judgment was predicated.

In this state of affairs Morano says that, being desirous of retaining the property he had purchased and improved, he entered into an agreement with Francis Martin and Gubernator, the parties interested, by which he retained the corner lot by paying one thousand dollars, the estimated value of the lot without the improvements he had made upon it; the other lot, valued at six hundred dollars, to be sold under the execution; that he moreover obligated himself to pay the damages awarded against him in the injunction suit and all costs, and that having paid in all \$2250, he was quieted in his possession of the property. To this sum he adds "damages suffered from privation of the property, loss, trouble, etc., \$2250," footing up his entire demand at the sum of \$4500.

Morano bought the two lots from Daniel Martin on the third of September, 1866, and gave, as recited in the deed, \$1200 for them. The suit of the city for the use of the McDonogh school fund against J. L. Gubernator was filed on the twenty-eighth of February, 1865, judgment rendered on the twenty-eighth of February, 1866, execution issued February 1, 1867, and returned satisfied August 29, 1867.

The date of the assignment by Stith to Francis Martin bears date of May 7, 1867. This shows that although the execution was not returned satisfied until the twenty-ninth of August of that year, the debt due by Gubernator to the McDonogh school fund had been paid several months before, and that this payment had been made before the termination of the plaintiff's injunction suit to stop the sale of the two lots he purchased from Daniel Martin. By the payment of the debt by Gubernator who owed it, the mortgage was extinguished. This fact, it seems clear, Morano might have shown in the injunction suit. He was then no longer in danger of being injured by this mortgage, which the city had been seeking to enforce. But it is held that the mortgage was transferred, and all the rights the city held under it passed to Francis Martin, who stood subrogated to them. On the other hand it is contended, and we think successfully, that there was no subrogation to Francis Martin. It seems clear that Stith was without authority to make it. The payment was not made by a third party, but by Gubernator, who paid \$2511 53 to the sheriff. Stith, in his testimony, says "no money came into my hands under this document," meaning the act of subrogation. He acted under an order of the board in passing the act, and does not know whether any money was received or not; that no money got into his hands personally for anything. He could not recollect whether Francis Martin was present at the time, nor whether Martin spoke to him on the subject. It is shown that an application had been made previously to the city attorney by Gubernator to have the subrogation made to a third party, whose name was not remembered, but the city attorney refused to

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comply. The conditions necessary to constitute subrogation are wanting in this case, Civil Code, 2155, 2156.

The facts shown by the defendants do not, in our opinion, enable them to sustain their plea of prescription. Civil Code, 3537, 3502. The act of omission by the recorder of mortgages which is complained of, if it give rise to an action at all, it is a personal action, and not in the character of a real action which follows the property. There is no liability on this defendant in the nature of warranty. There is no privity between him and Morano. See the case of *Smith v. Moore*, 9 Rob. 65. If liable on account of the omission complained of, the recorder would only be answerable in a personal action to the person purchasing the property.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed as to the decree rendered against Alfred Shaw, and affirmed as to that in favor of the other defendant, Daniel Martin, the plaintiff and appellee paying costs in both courts.

Rehearing refused.

No. 2912.—HENRY SAFFORD v. D. R. CARROLL.

An attorney at law is entitled to be paid a fair compensation for his services by the party who employs him in a litigation. If by compromise between the plaintiff and defendant, after judgment, the defendant agrees to pay the counsel fees of plaintiff in the case, such agreement is not binding on the attorney, and he may, notwithstanding the agreement, recover from his client a fair compensation for his services.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Semmes & Mott*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment against him for \$2500 for professional services rendered by the plaintiff in the case of *D. R. Carroll & Co. v. D. H. Boullet*, in the District Court of the parish of Natchitoches.

It is shown that the plaintiff prosecuted the claim to judgment and afterwards caused it to be executed; the judgment was for \$27,500 and the property bought thereunder by the defendant is shown to be worth \$30,000, although under an agreement of parties it was purchased for a nominal price.

The value of the services is fully shown by the evidence; indeed, it is not seriously contested by the defendant. But the latter insists that the judgment against Boullet was the result of a compromise by which the firm of *D. R. Carroll & Co.* was to have \$25,000 and the defendant, Boullet, was to pay all costs, including the fee of the plaintiff, \$2500.

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But the judgment under which the defendant bought the property and which he agreed should be considered discharged after buying the property seized thereunder, even though the price of adjudication should be less than the amount thereof, was in favor of D. R. Carroll & Co. and against the defendant, D. H. Boult, for \$27,500, \$2500 thereof "being the amount of fee incurred to H. Safford, Esq., plaintiff's attorney at law," etc. By accepting the property in discharge of the whole judgment the defendant became liable to the plaintiff for his fee secured therein, even though the latter had only recourse against the judgment debtor. But it is not shown that the plaintiff agreed to discharge D. R. Carroll & Co. from their obligation to pay his fee; no consideration is shown for such discharge and no one is presumed to give. Because in the compromise resulting in the judgment to which we have referred Boult stipulated to pay the fee of D. R. Carroll & Co., attorney, that did not preclude the attorney from demanding of his clients a just remuneration for his services.

There is no merit in the defense.

Let the judgment be affirmed, with costs.

No. 2376.—A. SHIFF, Agent. v. E. EZEKIEL.

Failure to pay the rent as it becomes due, is sufficient cause to authorize the provisional seizure of the tenant's property. The fact that the landlord has abated former installments of the rent at the request of the tenant, furnishes no reason why he should be deprived of the legal process to enforce its payment promptly in the future.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Clarke, Bayne & Renshaw*, for plaintiff and appellant. *Cotton & Levy*, for defendant and appellee.

WYLY, J. The plaintiff appeals from a judgment on a rule setting aside the writ of provisional seizure sued out by him against the defendant to recover the rent which the latter agreed to pay him for the lease of a building on Camp street. The proceeding seems to have been regularly taken out under article 287 C. P., on a written contract of lease in which the defendant agreed to pay for the premises \$417 per month, one month's rent being past due.

Because the plaintiff had for several months prior voluntarily abated the monthly installments at the request of the defendant, no obligation thereby arose compelling him likewise to do so in the future.

Failure to pay the rent was sufficient cause for the provisional seizure; the property of the defendant in the premises being for sale, the plaintiff might justly fear its removal. 8 An. 366, 374.

It is therefore ordered that the judgment herein be avoided and annulled; and it is ordered that the rule herein be discharged and that this cause be remanded to be proceeded in according to law, appellee paying costs of appeal.

Reiners v. St. Ceran.

No. 2338.—HENRY REINERS v. VALENTINE ST. CERAN.

The plea of payment admits the correctness of the plaintiff's demand, and when made concludes every other defense to the action.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. J. E. Planchard*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

Howe, J. This case was before this court in 1867 and was remanded to give the defendant an opportunity to plead payment. 19 An. 207. It is evident from the decree then rendered that this plea of payment was allowed to be filed as a peremptory exception, which admitted the claim of the plaintiff to be correct, and alleged that it had been extinguished by payment.

On the second trial the court again gave judgment in favor of plaintiff for the balance claimed, and the defendant has again appealed. Instead of confining his defense to the permitted issue, which admits the claim of plaintiff to be correctly set forth in his petition, and alleges its payment, he now attempts to obscure the case by raising points which have no merit. His plea of payment, at which alone it is necessary to look, is not established.

Judgment affirmed.

Rehearing refused.

No. 2609.—NICHOLAS HOBSON v. EMILY WOOLFOLK—CLARK and HUBBARD, Garnishees.

Third parties who have stored or deposited their cotton in the gin of the defendant, can not recover damages from the seizing creditor, caused by the burning of the gin while it was under seizure, unless it be shown affirmatively that the seizure was the cause or occasion of the fire.

If the plaintiff and seizing creditor be a resident of another State, citation to answer a reconventional demand set up by defendant, or citation in case of intervention by a third party, is unnecessary. C. P., 375.

APPEAL from the Fifth Judicial District, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellant. *Samuel Matthews*, for garnishees and appellees.

TALIAFERRO, J. The plaintiff, who is a resident of Tennessee, and a judgment creditor of the defendant, caused execution to issue, and took out process of garnishment against Clark and Hubbard, lessees of a plantation called "West Oaks," assumed by plaintiff to have been leased for a large sum by the defendant to the garnishees. The plaintiff took out a writ of provisional seizure in order to exercise his debtor's supposed privilege as lessor, and caused the movable property on the premises, belonging to the lessees, to be seized and taken into the possession of the sheriff. The seizure embraced the mules, carts,

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farming utensils, a number of bales of cotton, corn and other crops, furniture, etc. The garnishees in their answer denied that they were in any manner indebted to Emily Woolfolk, or that she or the plaintiff had any privilege as lessor or any other lien on the movable property seized on the "West Oaks" plantation, under the writ of provisional seizure, taken out by the plaintiff. They claim in reconvention the sum of \$17,376 20 as damages sustained by being deprived of the control and use of their property; the further sum of \$8000, value of thirty-seven bales of cotton, consumed by fire during the time it was under seizure; \$1500 as attorney's fees, incurred in defending the proceedings taken against them, etc. Interventions were filed by Campbell and Bogan, the former alleging the loss of two thousand pounds of ginned cotton, consumed by the burning of the gin on the "West Oaks" plantation while it was under seizure by the plaintiff and out of the possession of the lessees, Clark and Hubbard. The other intervenor, on the same ground, claimed \$3270 as damages sustained from the loss of cotton by the burning of the gin. The lessees had judgment in their favor on their reconventional demand for \$2829 26. The intervenor, Campbell, had judgment against the plaintiff for \$497 09. Bogan, the other intervenor, having died pending the suit, and no revival being made, no judgment was rendered on this claim.

The plaintiff has appealed.

It is fully established that the lessees of the "West Oaks" plantation obtained it by contract of lease from the heirs of Beaty, through their agent, and that Mrs. Woolfolk had no interest whatever in the lease, and was to receive nothing on account of it.

The defense set up against the reconventional demand of the lessees rests chiefly upon technical grounds. It appears that Clark and Hubbard, and Ide, a resident of Ohio, had formed a partnership in the planting business, and that they owned the property that was seized by the plaintiff, except that portion of the cotton claimed by the intervenors, who had placed their seed cotton in the West Oaks gin, to be ginned for them by the lessees. The plaintiff contends that Clark, Ide and Hubbard, being particular partners, are third parties to the suit; that Clark and Hubbard, individually, were garnisheed; that a claim for the partnership could only be presented by intervention. It is objected that the plaintiff was not cited to answer the reconventional demand, the citation made upon his attorneys being insufficient. For the same reason it is urged that there was no citation made on the plaintiff by the intervenors, and that the judgments rendered are null.

The plaintiff, Hobson, being a resident of a different State, the reconventional demand could be set up against him. Code of Practice, 375. No citation was necessary. The plaintiff was in court and bound to take notice of the demand in reconvention, and the law

raises an issue on that demand without an answer in writing. 3 L. R., 100; 3 N. S., 364. The answer of the parties made garnishees that they, with Ide, constituted a planting partnership, did not affect their right to claim as partners the damages they alleged were sustained by the acts of the plaintiff, who caused the partnership property to be taken into the custody of the sheriff, under a writ of provisional seizure, and who proceeded against the two resident partners by process of garnishment.

The court is of opinion that the cause assigned for the damages alleged to have arisen from the loss of the cotton is too remote to admit of charging the plaintiff with the loss. The occurrence of the fire, by which the cotton was destroyed, did not result directly from the seizure of it by the sheriff, and was an event the plaintiff had no agency in bringing about. We think, therefore, that the court *a quo* erred in allowing the defendants the sum of \$2185 50 as damages sustained by them for the loss of cotton. For the same reason the allowance of the claim of the intervenor, Campbell, for \$457 90 as damages arising from the accident by fire should be rejected.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, so far as it awards to the defendants \$2485 50, and the intervenor, Campbell, \$457 90 as damages for loss of cotton. That the judgment be annulled by striking out and disallowing the same, and that the judgment so amended be affirmed, the defendants and appellees paying costs of this appeal.

NO. 2363.—SUCCESSION OF MAGDELINE YOUNG.

A purchaser of property sold under an order of the court to affect a partition of community property between the surviving partner and the heirs, may be compelled to comply with his bid, if the record shows that all the formalities required by law have been complied with in making the sale.

A PPEAL from the Second District Court for the parish of Orleans. *Duvigneaud, J. Cotton & Levy*, for appellant. *Brice & Mitchell*, for appellees.

HOWELL, J. This is a proceeding against the adjudicatee of succession property sold on the petition of the surviving husband and natural tutor of a second set of minor children of the deceased, to compel him to comply with his bid. His answer is that the sale was made without issue being joined or judgment rendered in the suit for a partition, and that a legally formed family meeting was not held in the case by the appointment of a special tutor *ad hoc* for each minor.

The deceased left two sets of minor children—one by the surviving husband, N. Young, who was confirmed their natural tutor, and W.

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Seifert, appointed under tutor, the other by a former husband, N. Baker, to whom A. Dorr was appointed tutor and P. Dorr under tutor. Young prayed for a second inventory on the ground that since the date of the first valuable improvements had been made on the community property which enhanced its value; for the appointment of experts to report whether said property could be divided in kind or must be sold for a partition thereof between himself as survivor in community and the heirs of his deceased wife, as his interest was distinct from that of his own children; that their under tutor as well as the tutor of the Baker children be cited. Citations were accordingly issued and served. The inventory was taken, the experts reported that a sale was necessary; this report and the inventory were homologated, a family meeting to advise as to a partition and fix the terms of sale were prayed for and ordered, the deliberations of the family meeting recommending the partition and fixing the terms of sale were approved by the tutor, Dorr, and under tutor, Seifert, and homologated by the court and the sale ordered.

This seems to be a compliance with all the essential requirements of the law for making an inventory and sale of community property for the purposes of partition. It is true there was no formal answer to the petition for partition nor default entered, but the proper representatives of the minors were cited; they attended the family meeting and expressed their approval of the partition and sale, and the homologation of these proceedings was an authority for the partition and sale upon which the order of the court issued. The purchaser has no interest in raising the question as to the form or mode of making the partition.

The grounds urged by the purchaser for not complying with his bid are not sufficient, and the district judge did not err in ordering him to comply.

Judgment affirmed.

No. 2344.—MRS. WIDOW J. M. ARENT *v.* FRANCIS BONE et al.

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124	621

The prohibition to the lessee to sublet the leased premises in a private act of lease not recorded, is not binding on a third party who subleases the premises from the lessee.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. D. Craig*, for plaintiff and appellee. *J. M. Dirhammer*, for defendant and appellant.

WYLY, J. The defendant, Francis Boné, appeals from the judgment against him for the value of the property of the plaintiff, which he caused to be seized and sold in satisfaction of his claim for rent against his tenant, Charles Moore, occupying the premises at 57 Rampart street.

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The plaintiff was an under tenant, having rented part of the leased premises from the said Charles Moore; she was not indebted to the latter at the time the provisional seizure was levied on her property, and, therefore, the lessor, Francis Boné, had no right of pledge thereon. C. C. 2676. But the defendant contends that in the contract of lease the said Charles Moore bound himself not to underlease the property without his written consent, which was never given. This is true; but the contract of lease was an unrecorded private act. It was, therefore, inoperative as to the plaintiff, a third party, who is presumed to have dealt with the lessee under the provisions of article 2696 of the Civil Code, which gives the lessee the right to underlease. The appellant has not filed a brief and we are unable to perceive any error in the judgment.

Judgment affirmed.

NO. 3373.—STATE OF LOUISIANA, ex rel. SAMUEL SMITH & CO., v. THE BOARD OF LIQUIDATORS OF THE FLOATING DEBT OF THE STATE.

The act of the General Assembly approved March 4, 1871, which authorized the Board of Liquidators of the floating debt of the State to exchange a certain amount of bonds of the State for warrants on the State Treasury at a certain rate of discount, by limiting their power of exchange to a certain amount of bonds, vested in them a discretion as to what warrants they would accept in exchange for the bonds placed in their hands for that purpose. The writ of mandamus will not, therefore, lie to compel them to make a pro rata distribution of the bonds in their hands to the different creditors in proportion to the amount of warrants they may respectively hold. 22 An. 318, 611.

The charges of bad faith against the Board of Liquidators can not be judicially inquired into in a proceeding by mandamus to compel them to do a particular thing.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Lea, Finney & Miller*, for relators, appellants. *Armand Pitot and Semmes & Mott*, for defendants and appellants.

TALIAFERRO, J. This and several other appeals came up in one record, and all involve the same question. The Legislature of the State, in 1870, authorized the issuing of State bonds for the purpose of taking up the floating debt of the State. These bonds were to be exchanged for debts of the State, under the direction of the Governor, the Auditor, and the President of the Citizens' Bank of Louisiana, to constitute a board for the purposes of the act, to liquidate and redeem all outstanding warrants of the State; and, by an act approved March 4, 1871, the board was authorized and required to exchange the bonds for evidences of debt, at the rate of \$100 in bonds for \$70 of indebtedness. Under the authority of the statute it seems the board issued the following order:

“To the Citizens' Bank of Louisiana, Fiscal Agent—We have received the following evidences of floating debt of the State of Louisiana—amounting to \$359,069 67—to be exchanged for bonds at

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seventy cents on the dollar. [List of evidences of floating debt.] We hand you herewith the above mentioned evidences of debt, for which you are directed to deliver over to this board, for distribution to parties interested, \$513,000 Louisiana State six per cent. bonds, known as floating debt bonds, now in your possession.

(Signed)

H. C. WARMOTH, Governor.

JAMES GRAHAM, Auditor.

J. G. GAINES,

President Board of Liquidation."

On the eighth of March, 1871, before this order was executed, Samuel Smith & Co., obtained an injunction from the Eighth District Court of the parish of Orleans forbidding the Citizens' Bank, as the Fiscal Agent of the State, to part with or dispose of the bonds in its possession. On the same day the same plaintiffs and others obtained writs of mandamus against the Board of Liquidation, directed to the several members thereof, praying that they be obliged to receive from the various plaintiffs their warrants and certificates of indebtedness, amounting to \$165,000, and to deliver to them \$235,000 in State bonds, known as floating debt bonds.

The ground of complaint seems to be in all these cases that the Board of Liquidators used partiality, and were governed by favoritism in the action it was about to take in the matter of exchanging the bonds for warrants, there being a much larger amount of warrants and other evidences of State indebtedness presented for exchange than there were bonds to be exchanged, a strong competition arose among the holders of warrants in obtaining bonds for the State securities they held.

An exception was filed in behalf of the defendants, on the ground that there is nothing in the proceedings complained of authorizing the plaintiffs to resort to the writ of mandamus, and on the merits denied their right to the privileges claimed by them. The court below dismissed the rule, and from that judgment the several plaintiffs have appealed.

The act which the members of the board were required to do was ministerial, and from its very nature involved a discretion in them in regard to the manner of doing it. It was not possible for them to exchange bonds with all the holders of warrants. They were beset on all sides by the holders of the State securities, anxious to invest them in bonds, all clamorous to be served and importunate to obtain precedence of each other in exchanging. Before the act of the Legislature was passed authorizing the exchange on the basis of one hundred dollars in bonds for seventy dollars in warrants, it is shown that the president of the bank was repeatedly urged to receive warrants for large amounts in order that they might be first paid as soon as the bill

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then before the Legislature to authorize the exchange became a law. This unseemly haste certainly conferred upon those who exhibited it no right to be first served. Other competitors, who by sharp vigilance contrived to be first applicants after the bill became a law, would not thereby, in our judgment, be entitled to greater consideration. But the state of things engendered by the fierce competition placed the Board of Liquidators in a delicate position. They had to exchange the bonds with some of the parties; they could not exchange with all of them. A proposition, it is argued, was made on the part of the plaintiffs to adopt the supposed equitable mode of pro rata distribution. But what right has the board to make a pro rata distribution of the State bonds? They surely would not undertake to proceed in the distribution of those bonds as an administrator would do in distributing the assets of an insolvent estate. Where would be the equity if such a basis were adopted in limiting the division to those only who presented securities for exchange? Other holders, not presenting theirs, would get nothing. In short, a case was presented in which the necessity was forced upon the members of the board to exercise a discretion in performing the duty they had to discharge.

In such a case, this court has several times held that it is without power by mandamus to direct an officer how to perform a duty. If, in the exercise of the discretion he is vested with, he acts in bad faith and fraudulently, to the injury of parties interested, the act might be inquired into in another form of action, but we think it can not properly be done under a proceeding by mandamus.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs. 22 An. 318; *ibidem*, 611.

HOWE, J., *concurring*. The true object of the writ of mandamus is to enforce a clear legal right by compelling an officer to perform a legal duty which he has no discretion to decline. The showing made by relators does not authorize such a process. They claimed in their petition, and sought to prove, a right of absolute priority in the distribution of these bonds. This right of priority they signally failed to establish. Having thus failed, they shifted their ground completely, and claimed on equitable considerations a distribution pro rata, and even this they did not do by any amendment of their pleadings, but by a mere verbal request of their counsel. There is no law requiring such pro rata division. The respondents are not the administrators of a dead person, or the assignees of a bankrupt. The equitable right claimed is of very doubtful character, but if it exists, it is not to be enforced by mandamus. The courts of Louisiana, by proceedings *via ordinaria*, accompanied with the conservatory remedies provided in the

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Code of Practice, are amply able to protect equitable rights. Hennen's Digest, "Equity," page 480. They will marshal securities and determine priority as to contributions, and the rank of different claimants holding liens on the same fund or estate. They will decree an account of assets, arrest creditors in their race of diligence and force them into the court to litigate their claims together. In these particulars, as in many others, they proceed according to the principles of equity. But they do not proceed by mandamus. Much less do they attempt by mandamus to guide the co-ordinate branches of the government in any matter of mere discretion or good taste.

For these reasons, and those given in the written opinion of the judge *a quo*, I concur in the decree pronounced.

Rehearing refused.

LUDELING, C. J., *dissenting*. I can not concur in the opinion of the majority of the members of this court in this case.

The object of the writ of mandamus is "to prevent a denial of justice, or the consequence of defective police, and it should therefore be issued in all cases when the law has assigned no relief by the ordinary means, and *when justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever.*" C. P. article 830.

By the act No. 43 of the General Assembly of 1871, it was made the duty of the Board of Liquidators "to settle and redeem all the floating debt of the State created by authority of law, and also all certificates of indebtedness issued prior to the passage of this act, and all past due bonds and past due interest coupons of the State; and for that purpose said board is authorized and required to exchange said bonds for the aforesaid evidences of debt, at the rate of one hundred dollars in bonds for every seventy dollars or indebtedness."

It appears that the amount of warrants presented for exchange exceeded the amount of bonds held by the liquidators, and that they undertook to distribute them arbitrarily to parties who had deposited their warrants with different members of the board.

In my judgment, the law never contemplated conferring such powers on the Board of Liquidators. Before the law, all citizens are equal, and where the bonds were insufficient to absorb the debt for which they were intended to be exchanged, the only rule which should have governed the Board of Liquidators should have been the principle of *priority*—"the law favors the vigilant." The evidence shows that all the applicants for bonds made application before the law was signed. Therefore *all* the applications were in fact before the Board of Liquidators at the instant the law came into force, and in point of time *all* were equal.

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I think, therefore, that the bonds should have been distributed pro rata among the creditors of the State who asked to exchange their warrants. Justice and reason required that this mode should have been pursued, and I think this court should grant the writ to prevent an abuse of power and a wrong to citizens

HOWELL, J. I concur in the dissenting opinion of the Chief Justice.

No. 2285.—J. M. WELLS v. G. MERZ AND SHERIFF.

Judgments of the Supreme Court, whether affirming or reversing the judgments appealed from, must be sent back to the inferior court for their execution. C. P. 915. The objection that the execution did not issue on the judgment of the Supreme Court, can not therefore be urged by the defendant in execution.

The objection by the defendant in execution that the property seized was not advertised in the official journal is without weight, if at the time of the advertisement there was no official journal in the parish. The fact that an official journal was selected before the day of sale, will not affect the validity of a sale which had been advertised according to law before it was selected.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. W. B. Hyman*, for plaintiff and appellant. *Dirhammer & N. Commandeur*, for defendants and appellees.

HOWELL, J. Plaintiff enjoins the execution of a judgment against him as indorser of a promissory note, and seeks to annul it on various grounds, as follows:

First—That the writ directs the execution of the judgment of the district, instead of the Supreme Court.

Art. 915 C. P. declares that no execution shall issue on the judgments of the Supreme Court, but such judgments, whether confirming or reversing those appealed from, shall be sent back for their execution to the inferior court, and no mandate need be directed to the latter for that purpose; but the clerk may file and record them, and issue execution thereon as the judgments of the inferior court.

Second—That the property seized was not advertised in the official journal of the parish of Jefferson.

At the time of seizure an official journal for said parish had not been selected, and it was not the duty of the sheriff to wait until such selection might be made. Having advertised the property according to law, the subsequent selection of an official journal before the day of sale, did not render the advertisement invalid or affect it in any way.

Third—That the property was not advertised to be sold on the first Saturday of the month, as required by the act of 1855. The attempt in 1861 to repeal the act of 1855 was null, because it was an act of a rebel Legislature, and the act embraced two objects.

The Constitution of 1868, section 149, cured the first defect, if it existed, and there seems to be no application of the second objection.

Wells v. Merz and Sheriff.

Fourth—That the judgment should be annulled, as there was fraud in obtaining it.

It seems that pending the suit against Wells and others as indorsers, Merz, the plaintiff in said suit, collected a part of the claim, and did not make the credit before obtaining judgment, but did place it on the execution when issued. No injury resulted therefrom to Wells, and no cause for annulling the judgment on account thereof. It is contended further that time was given by Merz to the principal debtor, who gave other security to Merz, and these facts were fraudulently concealed from Wells, until after judgment was rendered against him, by which he was released.

The evidence does not sustain this charge; and we concur in the opinion of the district judge that plaintiff has shown no sufficient reason for annulling the judgment against him or enjoining its execution.

Judgment affirmed.

Rehearing refused.

No. 2382.—MRS. C. A. P. GRAHAM v. CHARLES S. RICE.

In case there is no note of evidence in the record of appeal, it will be presumed that the judgment of the court *a qua* was properly rendered, and upon evidence properly before the court.

28	393
52	710
23	393
50	646
23	393
123	341

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Bentinck Egan and L. Madison Day*, for plaintiff and appellant. *Whitaker & Rice*, for defendant and appellee.

TALLIAFERRO, J. The plaintiff sues on a promissory note for \$800 due twenty-fifth December, 1867, with five per cent. interest from maturity. The defendant pleads payment and sets up a reconventional demand against the plaintiff for \$71 65, with legal interest from judicial demand. The judgment of the lower court was against the plaintiff and in favor of the defendant for his reconventional demand. The plaintiff has appealed.

The plaintiff contends that although some testimony and documents are found in the record, the same were not offered in evidence. We find no note of evidence in the record. In such a case we will presume that the judgment was properly rendered and upon evidence properly before the court. The testimony in the record justifies the judgment rendered. The note itself is credited with a payment of \$200. Several other credits on it were acknowledged by the plaintiff and others established by the defendant, sufficient in all to extinguish the note and leave a balance in favor of the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Dunklin v. Horrell, Gayle & Co.

No. 2295.—G. W. DUNKLIN v. HORRELL, GAYLE & Co.

A resident of Missouri during the late war between the United States and the so-called Confederate States, while Confederate notes were the only circulating medium in New Orleans, shipped and consigned to merchants in the latter place a lot of corn to be sold. The corn was sold for Confederate money and advices given to the owner with return of sales, and the Confederate notes which had been received were forwarded in kind; but on account of military operations they failed to reach the plaintiff, who resided in Missouri. On receiving notice of the result the consignor objected to the mode of transmission by the agent in New Orleans, but made no objection as to the sale for Confederate money. Held—That having made special objection to the mode of transmission and not having made any as to the consideration or currency received for the price of the corn sold, he must be considered as having ratified the sale and receipt of that kind of currency, and that he can not now recover on the account of sales.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *J. Ad. Rozier*, for defendants and appellants.

HOWELL, J. Plaintiff, a resident of Missouri, sues on an account of sales of a lot of corn rendered by defendants on twenty-first February, 1862.

One ground of defense is, that at the time said corn was shipped the plaintiff knew that it could be sold only for Confederate treasury notes, which were then the only currency in circulation in this city; that the corn was sold for said currency and according to plaintiff's instructions, received with the consignment; a part of the proceeds was invested in a bag of coffee and a bale of osnaburgs, and the balance put up in a package, was forwarded with said goods to the care of J. D. Morton & Co., Memphis, Tennessee, to be forwarded by them to care of J. K. Robbins, New Madrid, Missouri, for plaintiff, which could not be done, as military operations prevented.

The proof is that the corn was received by defendants with a letter from plaintiff, dated February 14, 1862, which directed them to make the purchase, as above stated, and forward the same with the balance of proceeds to care of J. K. Robbins, New Madrid, Missouri; that after waiting five or six days in vain to ship to New Madrid, defendants shipped the package of Confederate notes and the two parcels of goods, marked for plaintiff, to J. D. Morton & Co., Memphis, Tennessee, with instructions to be forwarded to plaintiff; that Morton & Co., being unable to forward them, used the goods and deposited the package of Confederate notes with an agent, who still has it and who, in 1863, notified plaintiff of the fact, and that about the same time defendants wrote to plaintiff, informing him of the sale for Confederate currency and the disposition they had made of the proceeds and goods, and that plaintiff replied to this letter, complaining of the mode in which the shipment had been made as not in conformity to his instructions, and declaring his intention to hold the defendants responsible, but did not object to the currency for which his corn had been sold.

Dunklin v. Horrell, Gayle & Co.

Under these circumstances we are of opinion that he must have expected his property would be sold for the currency prevailing at the time in this market, and that when he was expressly informed that it was so sold, he did not repudiate the sale, but simply objected to the mode of transmission as not in accordance with his instructions, and that he has thereby ratified the sale and can not recover (see 22 An. 490) except for the amount invested in the goods ordered by him, for which defendants are liable, as their agents have made it impossible for them to be delivered. The amount is \$29 36.

It is therefore ordered that the judgment appealed from be reduced from \$798 78 to \$29 36, with legal interest from twenty-first February, 1862, and costs of the lower court, and as thus amended it be affirmed; plaintiff and appellee to pay costs of appeal.

No. 1738.—BENJAMIN JACOBS v. MRS. WIDOW M. B. WARFIELD.

A procuration or power of attorney which does not specify the time at which the agency is to terminate, leaves it discretionary with the principal to discharge the agent at pleasure. The agent can not, therefore, maintain an action against his principal in damages for a breach of contract in having discharged him at any particular time, if good cause is shown.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Saucier & Michinard*, for plaintiff and appellee. *John H. Ilsley*, for defendant and appellant.

WYLY, J. The defendant has appealed from the judgment condemning her to pay the plaintiff \$2610 for violating the contract which she made with him on the sixth day of October, 1865, and for money advanced by him for her benefit under said contract.

In this contract the plaintiff was employed as an agent to superintend all the business of the defendant in the parish of St. John the Baptist, in relation to certain wild lands which the defendant owned in said parish; and he was specially authorized to take charge of and exercise general control over said property; to prevent the commission of trespass or wastes upon said lands, and to appear in court to prosecute and defend all suits in reference thereto, as occasion might require, "with the distinct understanding that no other charge shall be made by the said Jacobs for his services in taking charge of the said lands and removing therefrom all trespassers, than one-fourth interest in the revenue derived from the sale of wood and timber cut therefrom by said Jacobs and his employes, as herein expressed, which shall be a full and adequate remuneration and compensation for all services that he, said Jacobs, may render the said Mrs. Warfield under and by virtue of this procuration." It was further stipulated that the said agent was not to institute proceedings against any trespasser

Jacobs v. Widow M. B. Warfield.

without first obtaining the written consent of the defendant; and, also, that the said Jacobs was in no wise to disturb or interfere with such persons as might have the written sanction of Mrs. Warfield to be on said lands and cut and sell timber therefrom.

There was no period fixed in the act as the term for which the said Jacobs was employed.

Under this contract we think the defendant had the right to discharge her agent and employe whenever she saw fit to do so.

From the evidence we are satisfied that the plaintiff did not comply with his contract, and the defendant had good cause to discharge him. His demand for damages for breach of contract must, therefore, fail. It appears, however, that the plaintiff paid ten dollars to an attorney and twenty-five dollars costs in a suit for the benefit of the defendant, and we think he was justifiable in doing so under the act of procuration. For these sums he should have judgment. The demand for the other sums which the plaintiff claims to have paid for the defendant pursuant to the contract is not supported by the evidence.

It is therefore ordered that the judgment herein be reduced to thirty-five dollars, and as thus amended that it be affirmed. It is further ordered that the plaintiff pay costs of this appeal.

Rehearing refused.

No. 2337.—SUCCESSION OF ARTHUR W. HORLOR.

Where an administratrix has been appointed after a contest for the position, she is allowed ten days to execute her bond and qualify. The appointment of another party by the judge before the ten days has elapsed is therefore null and of no effect.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud*, J. *A. L. Tissot*, for appellee. *Hornor & Benedict*, for appellant.

WYLY, J. James H. Jones, a creditor, applied for the administration of this succession and the surviving widow of the deceased opposed it and asked for the appointment.

The suit was tried, and on the ninth day of February, 1869, the judgment was signed, maintaining the opposition and ordering the opponent, Mrs. Horlor, to be appointed on giving bond and qualifying according to law.

On the nineteenth day of February, 1869, the said Jones presented a petition to the judge, alleging that the said administratrix had suffered more than ten days to elapse since her appointment without having qualified or caused an inventory to be begun; and he prayed the court to appoint him administrator, which was done on the same day. He then obtained an inventory and an order for the sale of the property.

Succession of Horlor.

Mrs. Horlor then instituted this proceeding to arrest the sale of the property and to set aside the appointment of the said J. H. Jones. The court gave judgment in her favor and he has appealed.

The appointment of Jones was intended to be made under the act of 1855, which provides "that whenever the testamentary executor or any other administrator of a succession shall suffer ten days to elapse after his confirmation or appointment without having either qualified or caused an inventory to be at least begun, the judge shall forthwith and *ex officio* appoint a successor in office, as if no such officer had been confirmed or appointed." In the case before us the ten days had not yet elapsed when the judge *ex officio* appointed Jones, and the appointment was consequently illegal.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2375.—JOHN SEILER *v.* DANIEL FAIREX.

The writ of injunction will not lie to restrain the owner of a plantation from seeking to annul and set aside a contract with another person, on the allegation that under the terms of the contract the agent has the exclusive right to control the plantation. In such a case the agent has his action against the principal in damages for violations of the contract, but he can not prohibit him from proceeding by the process of injunction.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Whitaker & Rice*, for plaintiff and appellant. *Cotton & Levy, E. T. Fellowes* and *E. Bermudez*, for defendant and appellee.

TALIAFERRO, J. The defendant engaged the plaintiff to take charge of his plantation, as sole manager thereof, for the term of eight years from the first of May, 1868. The terms and conditions of their contract are specifically set forth in a written instrument of considerable length. It appears that in pursuance of this agreement the plaintiff went upon the plantation with his family to reside, and proceeded to the discharge of his functions as manager to superintend and carry on the cultivation of it, having the exclusive control and direction of all the business affairs of every kind appertaining to the raising of crops and keeping the establishment in order and good condition. The contract appears to have been entered into in contemplation of a long absence in Europe of the proprietor, the defendant in the case.

About a year after this engagement was entered into, it seems the proprietor becoming dissatisfied, as alleged by the plaintiff, made use of improper means to supersede him in the control and management of the plantation, and endeavored forcibly to dispossess plaintiff by threats of violence and by efforts to remove his family off the place. The plaintiff thereupon resorted to a writ of injunction, which forms the basis of this action, to restrain the defendant from interfering with or disturbing him in the management of the plantation, and prays damages and costs.

Seiler v. Fairex.

In the court below the injunction was dissolved on an exception filed on the part of the defendant, and the plaintiff has appealed. We think the judgment correctly rendered. We are not aware of any right the plaintiff has under the contract to be maintained in the possession and control of the defendant's plantation against his will. If the latter think proper to violate his engagement with the plaintiff, he would thereby subject himself to damages in favor of the plaintiff.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

No. 2349.—WALTON & DESLONDE v. NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

Messrs. Walton & Deslonde, brokers, contracted with the New Orleans, Jackson and Great Northern Railroad Company to cause to be released from the custody of the United States authorities, and to sell or procure a purchaser for at a given price, a certain piece of property on Camp street, for which they were to receive five per cent. commission, or two and a half per cent. commission if they failed to procure a purchaser. They succeeded in getting the property released, for which they were paid two and one-half per cent. commission as agreed upon. Subsequently other brokers were employed, who negotiated a sale of the property, for which they were paid a commission. Walton & Deslonde now bring suit for the additional two and one-half per cent. commission on the gross sale, under their contract, alleging that the sale was taken out of their hands without their consent. The evidence shows that after several months delay, they failed to procure a purchaser on the terms and conditions prescribed by the company.

Held—That the first brokers, Walton & Deslonde, not having complied with the terms and conditions of the latter part of their obligation, by effecting a sale of the property or procuring a purchaser at the price and on the terms and conditions agreed upon, they are not entitled to recover the commissions therefor.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Clarke, Bayne & Renshaw*, for plaintiffs and appellees. *Campbell, Spofford and Campbell and L. E. Simonds*, for defendant and appellant.

WYLY, J. The plaintiffs allege that the New Orleans, Jackson and Great Northern Railroad Company placed in their hands for sale a house and premises on Camp street, opposite Lafayette Square; that they "developed a purchaser," who was willing to pay \$70,000 for said property; that the name of the proposed purchaser, viz: the Odd Fellows' Hall Association, was communicated to said company; that subsequently and while the said property was in their hands "for sale under agreement to pay them as brokers and agents two and a half per cent. commissions on the same, said property was, without any notice to them, sold, through other agents or brokers, to the same purchaser, viz: the Odd Fellows' Hall Association, for the same or less price than was offered through them, thus availing of the labor and skill of petitioners without compensation." On these allegations they prayed judgment for \$1750, being two and a half per cent. commissions on the price of said property, to wit: \$70,000.

The answer is a general denial.

Walton & Deslonde v. New Orleans, Jackson and Great Northern Railroad Company.

The court gave judgment for half the amount demanded by the plaintiffs, viz: \$875, and the defendant has appealed.

It appears that in May, 1863, the New Orleans, Jackson and Great Northern Railroad Company employed the plaintiffs to procure the release of the property described in the petition, which was then in possession of the United States military authorities, and to sell the same "for the price of seventy-five thousand dollars or more."

In the contract we find the following stipulation: "And it is further agreed that Messrs. J. B. Walton & Deslonde shall at once proceed to obtain the release of the property from the United States authorities and its restoration to its rightful owners, and to sell the same, for which services they are to be paid five per cent. on the gross amount of the sale as full compensation."

"In the event of the property not being sold, Messrs. J. B. Walton & Deslonde are to be reimbursed all costs for advertising, etc., and for obtaining the release of the property, they are to be paid a liberal commission, said compensation to be two and one-half per cent. on \$70,000, to include all expenses."

It appears that after much trouble the plaintiffs got the property released from the United States authorities, and being unable to get a purchaser for the price fixed in the contract, to wit: "\$75,000 or more," they collected two and a half per cent. on \$70,000, the amount of compensation fixed in the contract to cover all expenses for releasing the property in the event of the sale not being effected.

This settlement, we are satisfied, terminated the contract of the fourth of May, 1866, to which we have referred. How the plaintiffs can now claim two and a half per cent. commissions on this contract we can not imagine.

Under that instrument they undoubtedly had the obligation of the defendant to pay them five per cent. commissions "on the gross amount of the sale," provided they obtained the release and sold the property "for seventy-five thousand dollars or more," and in event of failure to effect the sale they were to have two and a half per cent. on \$70,000, as compensation for obtaining the release of the property and all expenses. They acknowledge that they have been paid according to contract for obtaining the release of the property, and they do not pretend that they have ever procured a purchaser for the defendant, who was willing to pay the \$75,000 for the property. It is not shown that this contract was ever amended so as to make it a perpetual one, and so as to preclude the owners from ever afterwards selling the property for a price less than \$75,000, without incurring the obligation to pay the plaintiffs two and a half per cent. on the amount of the price. It is admitted that the property was sold to the Odd Fellows' Hall Association in July, 1867, and the evidence shows

Walton & Deslonde v. New Orleans, Jackson and Great Northern Railroad Company.

that this sale was effected through other brokers, without the "labor and skill of the petitioners."

It is true the plaintiffs wrote to the President of the New Orleans, Jackson and Great Northern Railroad Company in March, 1867, proposing a purchaser at \$70,000, and this offer was rejected by him; and subsequently, to wit: on the tenth of May, 1867, the president wrote the plaintiffs the following letter:

"*Dear Sirs*—The Executive Committee of the Board of Directors of this company having reconsidered their action relative to the sale of the building on Camp street, opposite Lafayette Square, have concluded to dispose of it for \$75,000 cash, and if the parties who made you an offer some time ago are willing to pay the amount on these terms, we will give them the preference," etc.

It is not pretended that the plaintiffs procured a purchaser at the price stipulated in this letter.

Now, because the defendant several months afterwards concluded to sell its property for a less sum and through other agents, we do not see that a cause of action thereby arose in behalf of the plaintiffs.

It is not shown that the sale of the property by other brokers, of which the plaintiffs complain, was consummated by their labor or skill, and from the evidence we see no merit in the demand of the petitioners.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that there be judgment for the defendant, the plaintiffs paying costs of both courts.

Rehearing refused.

23 400
113 410

No. 2273.—SUCCESSION OF L. MILLAUDON—On Opposition of GEORGE HOLTZMAN.

No appeal lies from a judgment not signed by the judge *a quo*.

APPEAL from the Second District Court, parish of Orleans. *Durigneaud, J. C. Dufour*, for appellee. *R. H. Marr and John M. Bonner*, for opponent and appellant.

TALIAFERRO, J. The judgment rendered in this case appears from the record not to have been signed by the judge of the lower court. The appeal, therefore, is nugatory. It can not be entertained by this court.

It is therefore ordered that the appeal be dismissed at appellant's cost.

Rehearing refused.

 Succession of Josiah Huie.

No. 3242.—SUCCESSION OF JOSIAH HUIE—Contestation for Dative Testamentary Executorship.

Where several parties apply for the appointment of dative testamentary executor, the judge may exercise a sound legal discretion in making the appointment, and if the record discloses nothing showing that the discretion has been improperly exercised by the judge *a quo*, his judgment will not be disturbed on appeal.

A PPEAL from the Parish Court of Rapides. *J. H. C. Barlow*, Parish Judge. *H. S. Losee*, executor, in person, appellee. *R. J. Bowman*, for opponent and appellant.

TALIAFERRO, J. By the decease of the executrix appointed by the will of Josiah Huie, the office became vacant, and the affairs of the estate requiring a representative, three applicants presented themselves for the office of dative testamentary executor. The judge appointed the first applicant after hearing the two opponents. It is settled that, in cases like the present, the judge may exercise a sound legal discretion in making the appointment. We find nothing in the proceedings that authorizes us to conclude that the discretion has in this instance been improperly exercised. The succession is small and consists entirely of landed property. The case in 3 An. 566, is closely in point. Both the opponents have appealed. We see no good reason for altering the judgment.

Judgment affirmed

 ON REHEARING

HOWE, J. A rehearing was granted in this case on the suggestion that one of the applicants for letters of dative executorship was the beneficiary heir of the deceased, and therefore entitled to a preference in appointment. C. C. 1035, 1037, 1038; 6 An. 811; 10 An. 290; 18 La. 402; 2 R. 395.

We find, however, on examining the record that this beneficiary heir did not apply for the appointment. He merely opposed the appointment of Losee in favor of the other applicant. Rec. page 22. As between Losee and the other applicant, the judge *a quo* had the right to exercise a wise discretion, which we are not prepared to say has been improperly exercised in this case.

It is therefore ordered that our judgment heretofore rendered remain undisturbed.

State ex rel. Salomon & Simpson v. James Graham, Auditor.

No. 3358.—THE STATE OF LOUISIANA ex rel. SALOMON & SIMPSON v. JAMES GRAHAM, Auditor of the State of Louisiana.

The proceedings instituted against the Auditor of the State to compel him to warrant in favor of J. O. Nixon, under the act of the General Assembly passed March 1, 1871, No. 32, entitled "An Act for the relief of J. O. Nixon, late Public Printer," is a suit, and the State of Louisiana has the right to intervene to prevent her agent from being compelled to do an act which she avers is unauthorized by law. The State has, therefore, such an interest in the success of the defendant as will authorize her to intervene in the suit. 22 An 366.

The Legislature has no power by the terms and conditions of an act of the General Assembly to conclude the State itself from inquiring judicially into the validity and constitutionality of the act. In such a case the doctrine of estoppel has no application. In determining the amount of the debt of the State within the meaning of the third amendment to the constitution, it was held that all bonds authorized to be issued by the General Assembly on condition that something was to be done by the grantee as a condition precedent to their issue formed a part of the debt and must be estimated. It was held further that bonds of the State, which had been issued to the banks, although amply secured by mortgage, could not on that account be excluded from the estimate.

The State having employed J. O. Nixon as Public Printer, and having made full and complete settlement for all claims and demands, it was held that the act awarding him a certain amount thereafter passed on first of March, 1871, to make up a deficiency which he claimed to have sustained by being compelled to negotiate the warrants at a discount, created a new debt against the State. It was further held that it being shown by evidence offered in this case, that the State debt at the time of the passage of this act was in excess of twenty-five millions, the constitutional limit to which the debt could be allowed to go, and that therefore the act No. 32, of March 1, 1871, appropriating to J. O. Nixon fifty thousand dollars for the purposes set forth in the preamble of the act is unconstitutional, null and void.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Labatt & Aroni*, for relators, appellants. *Semmes & Mott, Hayes & New*, and *Hornor & Benedict*, for defendants and appellees.

LUDELING, C. J. The relators pray for a writ of mandamus to compel the State Auditor to issue a warrant to them for fifty thousand three hundred and thirty-one dollars and forty-six cents. They sue as the assignees of the right of James O. Nixon, under an act of the General Assembly of the State of Louisiana, passed on the first of March, 1871, and numbered thirty two.

The Auditor alledged, as cause for refusing to issue the warrant, that the act No. 32 of the General Assembly of the State of Louisiana is unconstitutional.

And the State of Louisiana, represented by the Attorney General, intervened in the suit, and denied the right of J. O. Nixon to a warrant, on the ground that the act No. 32 is unconstitutional, inasmuch as at the date of its passage the debt of the State exceeded twenty-five millions of dollars, and the General Assembly was prohibited by the third amendment to the constitution of the State, promulgated in December, 1870, to *increase* the debt of the State after it had reached that sum.

To this intervention the relators excepted, on the following grounds, to-wit:

State ex rel. Salomon & Simpson v. James Graham, Auditor.

First—That this is not such a case as authorizes the intervention of the State to prevent the issuance of the warrant demanded under act No. 32 of the Legislature of 1871.

Second—That the State is estopped by the terms of the act itself from appearing herein for the purposes set forth in the petition of intervention, and in law is estopped from disputing the validity of its acts duly passed according to law, and binding upon all officers of the government.

Third—That the intervention discloses no cause of action.

I. An intervention is a demand by which a third person requires to be permitted to become a party *to a suit* between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by *uniting with the defendant in resisting the claim of the plaintiff*. C. P. 337. In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit. C. P. 339.

Is the proceeding instituted by the relators against the Auditor *a suit*? We think it is. Has the State an interest in the success of either of the parties to a suit? Unquestionably she has. We can perceive no reason why the State should be denied the right to intervene to prevent her agent from being compelled to do an act which she avers is unauthorized by law. 22 An. 366, State, ex rel. Burbank, etc., v. Dubuclet, State Treasurer.

II. If the doctrine contended for by the relators be correct, the amendment of the constitution fixing the limit of the State debt would practically be without effect, whenever the Legislature inadvertently or designedly disregarded its provisions. The doctrine of estoppel is utterly inapplicable to a case like this.

III. The State is interested in enforcing the provisions of the constitution, and in resisting the claims of the relators.

The judge *a quo* correctly overruled the exception, and permitted the intervention. It is unnecessary, therefore, to decide whether the Auditor had any discretion relative to issuing the warrant in question.

On the merits, the question presented, is the constitutionality or unconstitutionality of the act of General Assembly passed March 1, 1871, and numbered thirty-two.

The solution of this question depends upon two facts: Did the debt of the State of Louisiana exceed twenty-five millions of dollars at the date of the act of the Legislature aforesaid, and did the said act *create* a debt?

The evidence in the record leaves no doubt that the debt of the State exceeded twenty-five millions of dollars on or before the first of March, 1871.

State ex rel. Salomon & Simpson v. James Graham, Auditor.

The total amount of bonds of the State, issued at that date, was.....	\$22,560,233 00
The total amount of debts other than bonds on December 31, 1870, was.....	2,461,501 40
Total debt on December 31, 1870.....	<u>\$25,021,734 40</u>

Between the thirty-first of December, 1870, and the first of March, 1871, the increase of warrants and certificates, was.....	\$ 552,174 14
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But if we concede, what is not true, that the uncollected back taxes would absorb the warrants and certificates of indebtedness, still there is no room to doubt that the *debt* of the State largely exceeded the limitation of the constitution on the first day of March, 1871.

The remaining bonds of the State, in favor of the Mississippi and Mexican Gulf Ship Canal Company, to be issued under act No. 116 of the General Assembly of 1869, amount to.....	\$126,000 00
The remaining bonds of the State, in favor of the North Louisiana and Texas Railroad Company, to be issued under act No. 108, of the General Assembly of 1868, is not less than.....	594,000 00
The bonds of the State, in favor of the New Orleans, Mobile and Chattanooga Railroad Company, to be issued under the seventh section of act No. 31 of the General Assembly of 1870, equal.....	<u>3,000,000 00</u>
Total amount of bonds to be issued.....	\$3,720,000 00
Total amount of bonds issued.....	<u>22,560,000 00</u>
Total amount of bonded debt.....	\$26,280,000 00

Besides this, the State has obligated itself to indorse the bonds of the New Orleans, Mobile and Chattanooga Railroad Company, and the New Orleans, Baton Rouge and Vicksburg Railroad Company to the extent of \$12,500 per mile of each of said railroads, as they are completed. It is contended that the bonds issued in favor of the property banks, amounting to \$4,839,933 33, should not be computed as *debts* of the State, because they are amply secured by the assets of the banks, and because the accrued interests thereon have been promptly paid by the banks. It is well known, especially in this country, that persons, natural and artificial, frequently fail in business; and from affluence they are suddenly reduced to insolvency. The present ability of the property banks to meet their liabilities is no guaranty that the State will not eventually have to pay her bonds, issued to aid said banks; and much less is it a reason to say that the said State bonds should not

be computed as a part of the debt of the State. If it had been intended to exclude these bonds or others in the computation of the debt of the State, limited by the constitution, it would have been done in express terms.

In the case of the city of Baltimore v. Gill, 31 Md., the court held that a temporary loan to the city, made on a pledge of railroad stock owned by the city, was a *debt*, notwithstanding it was stipulated in the contract that the city was exempted from all personal liability, and that the lender should look alone to the pledge for payment. In that case the city of Baltimore had attempted to evade a constitutional provision, by which the debt of the city could not be increased, except on the joint assent of the Legislature and of the people by a vote.

It is also insisted by counsel that "the indebtedness of the State can only be ascertained from the amount of the outstanding liabilities, for the payment of which, part of the principal and the annual interest, the authorities must provide and raise a revenue; but obligations or promises to issue hereafter bonds to railroads, when they are built and which, perhaps, never will be built, do not constitute an indebtedness, because the State need not provide to pay a part of the principal and the interest on the bonds which do not exist. And if the State is ever called on to issue such bonds they will be amply secured by mortgages, which will be at least an equivalent, and consequently an asset to counterbalance the liability."

The fallacy of counsel consists in assuming, first, that a conditional obligation is no obligation; and second, that the promissory note of A secured by a mortgage on the property of B, is not a debt of the maker, A, because it is secured. Both positions are untenable.

"Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition, etc. C. C., article 2021.

The condition being complied with has a retrospective effect to the day that the engagement was contracted; if the creditor dies before the accomplishment of the condition, his rights devolve on his heirs." C. C., article 2041. "And the creditor may, before the fulfillment of the condition, perform all acts conservatory of his rights." C. C., article 2042.

Thus the obligations of the State, in relation to the railroad companies aforesaid are suspensive and potestative conditional obligations; the State is a debtor to those companies, and the fulfillment of the conditions will have a retrospective effect to the time when the engagements were contracted. For example, when the Mississippi and Mexican Gulf Ship Canal Company will have completed the construction of the lock on said canal, the company will be entitled to demand the bonds of the State for \$126,000, and when issued, it will not be

denied, the bonds will form a part of the debt of the State. But when and how was the debt created? It is clear it was created by the act of the Legislature in 1869. The law on this subject is the same in the other States of this Union. "A party bound by either an express or an implied contract, in virtue whereof he may become liable to the payment of money, is a debtor, although his liability be contingent." 5 Barb. 410; 18 Wend. 375, 386; 5 Cowen 67; 8 Cowen 427; and 4 Greenl., 195.

The reasoning of Chief Justice Mellen seems conclusive.

"The objection is that Van Wyck was not a creditor of Seward at the date of the deed, because it was then uncertain whether he would ever have a cause of action on the covenant. Let us see where this doctrine would carry us. If one promise to pay money at a future day, he may pay before the credit expires, and until that time arrives, it is uncertain whether an action will ever accrue on the promise. The contract of surety only creates a contingent liability. Until the principal is in default, it is uncertain whether an action will ever accrue against the surety. The drawer of a bill of exchange is only bound to pay it upon a contingency, which may never happen; and so it is with the indorser of negotiable paper of all kinds. The contract of indemnity is another case where an action may never accrue upon the undertaking. In these, and all other cases depending upon contract, the person with whom the engagement is made is as much a creditor, within the meaning of the statute, as though he had a debt on which a right of action already existed."

Did the appropriation made in favor of J. O. Nixon create a debt against the State, or was it only a recognition of a debt existing prior to the constitutional amendment and unaffected by it?

The preamble to the act recites that, "Whereas the State of Louisiana, by act of March 22, 1866, and by her contract with James O. Nixon, as public printer, engaged to pay him in cash, monthly, certain rates and prices for public printing by him to be executed; and whereas said Nixon executed his bond for ten thousand dollars to the State for the faithful performance of his duties as public printer; and whereas the said Nixon did faithfully and promptly execute the duties incumbent on him by law; and whereas the State paid him only part in cash and the remainder in warrants, which he was compelled to receive or get nothing at all; and whereas to comply with his engagements to the State he was compelled to sell these warrants at various and heavy discounts; and whereas good faith of the State requires that it should make good the losses incurred," etc.

It appears from these recitals that the State had settled with J. O. Nixon in full for the work done by him as public printer, and that his necessities compelled him to sell at a discount his warrants, received

in the settlement. If instead of the State it had been a private individual who had contracted with Nixon and who had given his note in settlement, could Nixon have enforced his claim for losses in consequence of the sale of the note? Certainly not. After the settlement aforesaid and the sale of the warrants the State did not owe Nixon, but the holder of the warrants. Therefore the act No. 32, if valid, necessarily created a debt.

But it is contended by the relators that the appropriation does not create a debt, "because the money is presumed to be in the treasury." This raises the very serious question whether or not the Legislature can make appropriations, unless there be money to meet the warrants authorized thereby, either actually in the treasury or provided for by the revenue bill?

The power of appropriation is the right to apply to public purposes money in the treasury. Article 104 of the Constitution declares:

"No money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

An appropriation is an authorization to the Auditor to check upon the treasury for moneys there deposited. If, therefore, the revenues be inadequate to meet the interest of the public debt and the current expenses of the necessary State agencies to preserve the government, an appropriation (whereby the liabilities of the State are increased) for any other purpose than the support and maintenance of the machinery of government is a debt within the meaning of the constitutional amendment, which declares "that prior to the first day of January, 1890, the debt of the State shall not be so increased as to exceed twenty-five millions of dollars."

It is further contended that the prohibition in the constitutional amendment is inoperative until the Legislature shall provide by law how to carry it into effect. And the case of *Groves v. Slaughter*, reported in 15 Peters 449, is relied on to support the position. The case is wholly inapplicable.

That there are provisions of the Constitution which require legislative action to carry them into full operation, can not be doubted, but it is equally certain that there are other provisions of the Constitution which are effective independently of the action of the General Assembly. This amendment does not require legislation to be operative. 13 Barb. 63 and 188. It is a check upon the General Assembly itself, and its efficacy is independent of the legislative will. The proper way for the Legislature to give effect to this amendment is not to pass laws for its enforcement, but to refrain from enacting laws in violation of its commands.

The evidence shows that the revenues of the State are inadequate to the expenditures.

State ex rel. Salomon & Simpson v. James Graham, Auditor.

We are, therefore, constrained to declare that the act entitled "An act for the relief of James O. Nixon, late public printer," passed at the General Assembly of the State of Louisiana on the first day of March, 1871, is unconstitutional, null and void.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs of appeal.

Rehearing refused.

No. 2180.—JOHN WEST v. AR. MILTENBERGER.

The evidence in this case shows that during the year 1862, while Confederate notes were the only circulating currency in the Southern States, that B, a commission merchant in the city of New Orleans, had a lot of Confederate money in his hands to the credit of A; that, at the request of A, B, the merchant, addressed a letter of credit to C, the creditor of A, authorizing him to draw for the amount of the indebtedness of A; that C did draw on B for a portion of the indebtedness of A, and received the amount in Confederate money. C, the creditor of A, now brings suit against B for the amount of the indebtedness of A, disregarding the transactions under the letter of credit whereby he had received a portion of his debt in Confederate money.

Held—That under this state of facts B, the merchant, can only be considered as the agent of A to pass over the Confederate money in his hands belonging to A to his creditor, and he can not, therefore, be held liable to C on his assumpsit of the debt of A, which could only be discharged in lawful currency.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hays & New*, for plaintiff and appellee. *Cooley & Phillips*, for defendant and appellant.

This case was tried by a jury in the court below.

WYLY, J. The defendant has appealed from a judgment on the verdict of a jury against him based on the following instrument, viz:

"NEW ORLEANS, February 3, 1862.

John West, Esq., Lumpkin, Georgia: *Dear Sir*—In accordance with the instructions of Doctor J. T. Nolan, of West Baton Rouge, I have placed to your credit six thousand five hundred dollars (\$6500), which amount I hold subject to your order.

(Signed)

Yours respectfully,

AR. MILTENBERGER."

The defense is that the consideration of the letter of credit was Confederate money. In support of this plea the defendant attempts to prove that he was authorized by his constituent, Nolan, to sell his sugar crop for Confederate money, that Nolan had no other funds in his hands, and when he gave the letter of credit to the plaintiff as requested by Nolan, the motive or consideration to him was Confederate money.

Assuming that such was the case, we do not think the defense a valid one. The plaintiff is not in any manner connected with this Confederate transaction: he swears he never believed that the consid-

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eration in the stipulation between Nolan and the defendant was Confederate money; the debt which he held against Nolan was not for that unlawful currency; he is simply trying to collect a valid and lawful debt against the defendant, his delegated debtor.

The defendant argues that under the authority of the *Union Bank v. Bowman*, 9 An. 196, he can set up equities between him and Nolan, with whom the stipulation was made in favor of the plaintiff. Certainly he can. But the defense urged by him is not based upon any equities existing between the contracting parties; it is based upon immorality. If the plaintiff had taken part in the transaction resulting in the letter of credit declared on, the immorality thereof might be an effectual bar to his recovery, the policy of the law being to leave guilty suitors where they have placed themselves in such contracts. But he did not take part in the immoral dealing complained of, nor was he aware thereof.

However immoral the consideration of the stipulation between the defendant and Nolan may have been, the legal obligation which arose out of it or subsequent to it, in favor of the plaintiff, now sought to be enforced, was a lawful one.

As to the plaintiff, the undertaking of the defendant to pay the debt due him from Nolan was not immoral; his debt against Nolan being lawful, the delegated debtor's obligation in his favor was likewise lawful.

The defense urged is practically this: The defendant ought not to be compelled to discharge his obligation to the plaintiff, based on the letter of credit, because before that obligation was incurred, there was a contract between him and Nolan, in which, for a sum of Confederate money, he agreed to undertake the payment of this debt for Nolan.

Now the defendant is not sued by Nolan to compel him to make good the assumption of the debt as agreed upon, for Confederate money. That contract was executed, on the part of Nolan, by paying the Confederate money, and on the part of the defendant, by making the assumption or giving the letter of credit to the plaintiff. We therefore think the obligation of the delegated debtor to the plaintiff, evidenced by the letter of credit, is not tainted with immorality, and that it can be enforced.

Judgment affirmed

ON REHEARING.

TALIAFERRO, J. A review of this case inclines us to think there was error in the deductions drawn from the evidence in our first examination of it. Nolan, about the time he instructed Miltenberger

to place \$6500 to the credit of West, had evidently no other than Confederate money in his hands. Many letters of Nolan written to his merchant during the latter part of the year 1861 and the early part of 1862 establish this beyond all doubt. He spoke of Confederate money as the prevailing currency—expressed his confidence in the success of the rebellion—was entirely willing to receive and did receive the proceeds of sale of his sugar crop of 1861, in Confederate money. The testimony of Collens, the clerk of Miltenberger, abundantly establishes and confirms the fact that Nolan had no other currency of any kind in the hands of Miltenberger than Confederate money. In regard to the payment of Nolan's debt to West, Miltenberger can not be considered in any other light than as agent of Nolan to pass over to West a certain amount of Nolan's Confederate money. He was not the delegated debtor of West nor did he assume to pay any debt for Nolan. Nolan under date of February, 1862 writes to Miltenberger thus: "Please place to the credit of John West Esq., Lumpkin, Georgia six thousand five hundred dollars, and wrote to him that that amount is subject to his draft." The next day Miltenberger writes to West: "In accordance with instructions of Dr. J. T. Nolan, of West Baton Rouge, I have placed to your credit six thousand five hundred dollars, which amount I hold subject to your order." Then we think it beyond doubt that Nolan intended and expected the six thousand five hundred dollars to be placed to the credit of West, to be part of his Confederate money in the hands of Miltenberger, and that Miltenberger did place that sum to the credit of West in Nolan's Confederate money. He had no other kind of money belonging to Nolan in his charge, and when there was a universal suspension of specie payments everywhere throughout the Southern States, and Confederate money the sole and exclusive currency in this country, it is not to be presumed that when, under the instructions of Nolan, he wrote to West that he had placed six thousand five hundred dollars to his credit, that he meant any other kind of currency than Confederate money. Under the state of things then existing as to currency, the conclusion is not to be avoided, that West knew, as everybody else knew, of the then universality of Confederate money as currency in the Southern States, and that he did not expect payment in anything else. But the record shows that West did receive five thousand one hundred dollars of the amount placed to his credit, and in this manner. He drew a draft on Miltenberger for five thousand one hundred dollars, and sold the draft to a Georgia bank and received the amount in Confederate treasury notes. This is what he said himself in answer to an interrogatory. His purposes did not require him to draw for the whole amount in Miltenberger's hands, and the balance remained without appropriation and Miltenberger has it yet in his possession, having preserved in kind the Confederate paper money

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which by Nolan's directions and sanction he had received in payment for his crop of sugar. The pretension of West now, after that ephemeral paper currency has become utterly worthless, that he never believed that Nolan deposited Confederate money to his credit with Miltenberger, can not have much weight against the aggregate mass of testimony in the record which goes to show the contrary.

For these reasons it is now ordered that our former decree in this case be annulled and set aside, and it is further ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's cost, and that judgment be rendered rejecting the plaintiff's demand.

Mr. Justice Wyly adheres to the former opinion of the court.

No. 3208.—STEWART, HYDE & CO. v. MADAM SUZETTE BUARD.

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Where five parties own a tract of land in common, and all agree to sell and do sell and transfer it to one person, and the vendee gives his notes to each one for their respective shares of the land, and all the vendors join in the sale in one act, in which act of sale it is expressly stipulated that a mortgage is retained on the whole property as security for the payment of each one of the notes, and the vendee makes retrocession of four of the five shares of the tract of land to four of the vendors, then, and in that case, the third holder, before maturity, of the notes given to the fifth vendor for one-fifth interest in the land may enforce his mortgage rights against the whole tract of land first conveyed without reference to the retrocession.

If it be stipulated in a contract that in case the obligation is discharged in United States treasury notes, it shall be in the proportion of one dollar and thirty cents in currency for every dollar expressed on the face of the obligation, the proper decree and judgment is to reserve to the maker of the notes the option to discharge the obligations in gold. A decree that the defendant be ordered to pay in currency with thirty per cent. additional is incorrect, because at the time of payment the price of gold might be less than thirty per cent. premium.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Clark, Bayne & Renshaw and Chaplin & Son*, for plaintiffs and appellees. *Pierson & Levy*, for defendant and intervenor, appellant.

LUDELING, C. J. The plaintiffs sue the defendant, Suzette Buard, on two promissory notes, each for fifteen hundred dollars, with eight per cent. per annum interest from maturity and due respectively on the first of February, 1868, and first of February, 1869. They allege that, by a written contract, it was stipulated that if the notes be paid in United States treasury notes, it should be in the proportion of one dollar and thirty cents in currency for every dollar expressed on the face of the note. They allege that the notes were transferred to them before maturity as collaterals according to law; that the notes are secured by a mortgage on certain property described in an act of sale, to be found in the record; and they pray for judgment against

the defendant for \$3900, with interest at the rate of eight per cent. per annum from maturity of the notes; and they further pray for the recognition of their mortgage on all the property before mentioned.

J. E. Buard et al. filed an intervention in this suit. They allege that they and L. A. Buard were the owners of all the property claimed to be mortgaged to the plaintiffs, on the nineteenth day of March, 1866; that they inherited the property from their father, L. A. Buard, and each owned an undivided fifth of the whole property. That on the nineteenth of March, 1866, they joined in an act by which they sold and transferred to their mother, Suzette Buard, their interests in the property in consideration of her executing her notes, in favor of each heir for the sum of six thousand dollars. That on the nineteenth day of June, 1867, their mother being then unable to pay the notes given for the price of the property, and the future payment by her being hopeless, retroceded by public act the aforesaid property to all the vendors. They aver that by this act they were reinvested with their interests and ownership in the property, and that all the notes, except those payable to L. A. Buard, Jr. (of which those sued upon form a part), were surrendered and canceled. They allege that the plaintiffs knew when they took the notes from L. A. Buard, Jr., the extent of their mortgage security, and the interest of L. A. Buard in the property. They further aver that the interest of L. A. Buard in the property is alone liable to the mortgage given to secure the notes sued on. They resist the plaintiffs' demand to have their property sold under the mortgage. There was judgment in favor of the plaintiffs, and the defendants and the intervenors have appealed.

On the trial of the cause the intervenors offered witnesses to prove the inability of Suzette Buard, to pay for the property sold to her; and that the plaintiffs knew the extent of their mortgage and of the interest of their transferrer in the property sold, for which the notes sued on were given. The plaintiffs objected on the grounds that the evidence was irrelevant, and was intended to modify or explain by parol the written contract, which objections were sustained by the court, and the intervenors took a bill of exceptions to the ruling. The testimony was not offered to contradict or explain the authentic acts; but to prove facts, first, which occurred after the making of one act, and second, facts which showed the necessity for making the other act. The objection of irrelevancy is very weak, and although in this case, under the pleadings, there was no necessity to prove the inability of the buyer to pay the price, yet we can see no good reason to prevent the parties from proving the fact, to show their good faith. In *Chretien v. Richardson* the court held that "when a contract has been rescinded extra judicially, or by a consent decree, the *onus* of proving the necessity devolves upon the party who claims the benefit of the

resolution." 6 An. p. 6; 7 An. 135. The testimony should have been received.

From the evidence in the record, it appears the notes sued on were executed in favor of one of the five heirs of L. A. Buard, to wit: To L. A. Buard, Jr., and that he had pledged them to the plaintiffs. The notes were given by Mrs. Buard in consideration of the abandonment of all claims against the estate of A. L. Buard, deceased, and the transfer and sale of all his right and interest to all the property of the succession to his mother. For a similar purpose she had executed like notes to the other heirs of the succession. These different stipulations by the mother in favor of the five several heirs of her husband in consideration of the sale of their respective rights in the succession of their father, were contained in one act passed on the nineteenth of March, 1866. In this act the vendor's privilege was retained, as well as a mortgage upon the property sold. What are the rights and obligations growing out of this act? The plaintiff insists that it conferred on the holder of each note the right to enforce the mortgage to pay his debt against all the property, notwithstanding the rescission of the sale for the non-payment of the price. We can not give our assent to this proposition.

Article 2079 of the Civil Code declares that "several obligations, although created by one act, have no other effect than the same obligations would have had if made by separate contracts; therefore they are governed by the rules which apply to contracts in general." In the act already referred to Mrs. Buard bound herself to pay thirty thousand dollars for the property of the succession of L. A. Buard, and she gave her separate obligations in favor of each of the five heirs for six thousand dollars thereof—being for his share of the property.

Article 2073 says that "several obligations are produced, when what is promised by one of the obligors is not promised by the other, but each one promises for himself to do a distinct act; such obligations, although they may be contained in the same contract, are considered as much individual and distinct as if they had been in different contracts, and made at different times."

Article 2074 declares: "In like manner, a contract may contain distinct obligations to perform different things in favor of several persons; the obligations in this case are several and unconnected, and each obligee has his separate and distinct remedy on the obligation created toward him." Construing the contract of the nineteenth March, 1866, in accordance with these articles of the Civil Code we are not left in doubt as to the rights and obligations which spring from it

The contract contains distinct obligations to perform different things in favor of several persons; that is, the purchaser obligated herself to pay to the several persons who had sold their interests in the property,

the price of their property severally. The obligations are several and unconnected, and "each obligee has his separate and distinct remedy on the obligation created toward him"—in the same manner as if the obligations had been in different contracts, made at different times. 15 La. 596, *Walton & Kemp v. Lizardi et al*; 5 Rob. 73, *Erwin v. Green et al*.

What then was the remedy that each seller had on the obligation created in his favor under the contract of nineteenth of March, 1866? In the language of article 2539 of the Civil Code, we answer: "If the buyer does not pay the price, the seller may sue for the dissolution of the sale." 10 Rob. 416; and "Whenever a necessary cause of resolution exists, the purchaser may do voluntarily what he can be compelled to do by suit." 6 An. 6; *Chretien v. Richardson*; *Shields v. Lafon*, 7 An. 135.

This remedy was exercised by favor of the vendors. What was the effect of the resolution of the sale, on the mortgage given to secure the price of the interest of L. A. Buard, supposing that the mortgage extended over any other part of the property beyond what he sold?

Article 3268 of the Civil Code provides that "such as only have a right that is suspended by a condition, and may be extinguished in certain cases (in the French text, *ou résoluble dans certains cas, ou sujet à rescision*) can only agree to a mortgage subject to the same conditions and (or) liable to the same extinction." The title of the vendee was never indefeasible, and the title given by her to her creditor was liable to become extinct by the happening of the resolutory condition. 8 La. 83, *Mortee v. Roach's syndic*; 12 An. p. 700, *Johnson v. Bloodworth*.

The contract between Mrs. Buard and her five children stipulated that if the notes given by her were paid in United States treasury notes it should be in the ratio of \$130 in currency for every \$100 specified in the notes. The judgment against her is for the amount specified in the notes with thirty per cent. added thereto. This is erroneous. The maker of the notes should have had reserved to her the right to pay in gold, if she pleased. There is no certainty that gold will not be worth less than thirty per cent. premium when she is compelled to pay.

It is therefore ordered that the judgment of the district court be avoided and reversed. It is further adjudged and decreed that there be judgment in favor of the intervenors restraining the plaintiffs from selling their undivided four-fifths interest in the property mortgaged; and that there be judgment in favor of the plaintiffs against madam Suzette Buard for the sum of three thousand and nine hundred dollars, with interest at the rate of eight per centum per annum on nineteen hundred and fifty dollars from the first day of February, 1868, and on nineteen hundred and fifty dollars from the first day of February, 1869.

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till paid, and costs. And the right is reserved to Mrs. S. Buard to discharge this judgment by paying three thousand dollars in gold, with eight per cent. per annum interest on one-half thereof from the first February, 1868, and on the other half from the first of February, 1869, till paid, and costs. And it is further ordered that the mortgage given by the defendant on the property described in the petition and act of mortgage be recognized and enforced against the undivided interest of L. A. Buard, being one-fifth in and to the property aforesaid, to satisfy this judgment.

It is further ordered that the plaintiffs and appellees pay the costs of the intervention and of this appeal, and that the defendant, S. Buard, pay the other costs, incurred in the district court.

WYLY, J., dissented.

ON REHEARING.

WYLY, J. On the nineteenth day of March, 1866, the five heirs of L. A. Buard joined in an act conveying to their mother their respective interests or shares in a certain plantation inherited by them from their said father, and in order to secure the price represented by certain promissory notes in favor of the vendors respectively, the said vendee specially mortgaged all of the said property "in favor of the payees of said notes or their assigns until the full and complete payment of the same, principal and interest." Certain notes coming to one of the heirs were, before maturity, pledged to the plaintiffs; and when the pledgees instituted this suit against madam Buard to recover a personal judgment on the notes and to enforce the mortgage, the other four heirs intervened and ask that the mortgage be only recognized and enforced on one-fifth of the property embraced in the act of mortgage, the same being the share conveyed to the said madam Buard by the heir who assigned his notes to the plaintiffs and upon which alone the mortgage sought to be enforced operates; they allege that the other four-fifths of the property was reconveyed to them in consequence of the inability of their said mother to pay for the same; that this retrocession having the same effect as the enforcement of the dissolving condition restored the undivided four-fifths of the said property to them free of the incumbrance resulting from the mortgage; and by this act the mortgage sought to be enforced by the plaintiffs is restricted to the share of the heir from whom they acquired the notes.

There is no doubt that the effect of the dissolving condition is to discharge subsequent mortgage, granted by the vendee to third parties. But in the case before us the intervenors and plaintiffs' transferrer were the vendees and mortgagees; they were parties to the mortgage and consented to the following clause in the mortgage

granted by their vendee: "All of the said property to be and remain specially mortgaged in favor of the payees of said notes or their assigns, until the full and complete payment of the same, principal and interest."

By this stipulation the notes coming to each heir was not only secured by the interest or shares which he conveyed, but was secured by a mortgage on the whole property granted by the vendee with the consent of all the five vendors.

There is no doubt that the purchaser had the right with the consent of all the vendors to mortgage all the property to secure each note given to the several vendors, and having done so the holders of the notes acquired concurrent mortgage rights on all the property. There is no doubt that several distinct sales and mortgages may be embraced in the same act; and in the act of sale and mortgage before us it was perfectly competent if the parties had so desired for the vendee to secure the debt due each heir by a separate mortgage on the share conveyed by him; and in that case each heir could assert his rights against the delinquent vendee by a suit to enforce the mortgage, or by a suit to dissolve the sale, as to him might be most desirable, and the other heirs would not be affected thereby, or have any interest in the remedy resorted to.

But in the case before us the parties in interest consented by signing the act of mortgage that the vendee should hypothecate the whole property to secure each note, thereby the holders of the several notes acquired concurrent mortgage rights on the whole property.

Now, if the notes declared on were secured by mortgage on the whole property the day the mortgage was given by the vendee and accepted by the vendors, the incumbrance remains upon the property and is not affected by the retrocession to four of the heirs of the shares which they had conveyed to their mother. The mortgage rights of the plaintiffs is not affected by the act of retrocession, because neither they nor the heir from whom they acquired the notes were parties to the act of retrocession. "Agreements legally entered into have the effect of laws on those who have formed them. They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith." C. C. 1895.

It is therefore ordered that the judgment heretofore rendered by this court be amended so as to recognize plaintiffs' mortgage on all the property described in the act of mortgage, instead of one-fifth thereof, and that the intervention be dismissed at the costs of the intervenors; as thus amended, it is ordered that the said judgment remain undisturbed.

Mr. Chief Justice Ludeling adheres to the first opinion rendered by this court herein.

No. 3253.—JOHN H. MCKEE v. S. P. GRIFFIN et al.

In a suit by one partner for the settlement and liquidation of the partnership affairs of a commercial partnership, the partner claiming the settlement stands in no better position than that of any other creditor. It must therefore be shown affirmatively that he is a creditor, and that the other partner who is required to account is in default, before he can resort to the seizure of property, the title to which is not in the partnership, but which is alleged to be fraudulently in the possession of a third party under a simulated title.

In the suit of one partner against another, to compel the liquidation and settlement of a commercial partnership, under the allegation that a third person (who, it is admitted, is not a partner, and is in no manner interested in or connected with the partnership affairs), is the possessor of real estate, under a title translativ of property from the partner who is called to account, it was held that the writ of injunction could not be legally issued against such third possessor under such title, restraining him from using and enjoying his property, pending the suit for a settlement of the partnership, because in the first place, it is not established that the partnership is indebted to the complaining partner, and therefore he has no right of action against such third possessor, and consequently is without the right to seek the conservatory writ of injunction.

It was held, further, that a third party, holding real estate in the State of Louisiana under a title translativ of property, could not be divested of his property, collaterally, by a suit for the settlement of an ordinary commercial partnership, of which it was not alleged that he was a member, or that he was in any way connected therewith, under the allegation that such third person had acquired his title to such real estate with a knowledge that it had been purchased by his vendor with partnership funds.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Billings & Hughes* and *Ex. Sumner Mansfield*, for plaintiff and appellee. *William H. Hunt*, for S. P. Griffin, defendant and appellant. *J. Hawkins* (curator *ad hoc*) for C. C. Edey, an absentee, defendant and appellant.

TALIAFERRO, J. This action is brought to effect a settlement of the business of a commercial partnership, dissolved by the bankruptcy of two of its members, and, as incident to the settlement, to subject as part of the assets of the partnership certain real estate, the title to which is in a third party, an absentee, never in any manner concerned in or connected with the partnership. Upon the petition of plaintiff a curator *ad hoc* was appointed to represent the absentee. The plaintiff took a rule upon the curator *ad hoc* and the defendant, Griffin, to show cause why a receiver should not be appointed and an injunction issue. An exception was filed by each of the defendants. The ground taken by the curator *ad hoc* is that in the liquidation of a commercial partnership an injunction can not be legally issued to restrain a third party from using or disposing of real estate, the title to which is admitted to be in his name, and who is not alleged to be a partner or member of the partnership; that the absentee, Edey, having a recorded title translativ of property to the real estate sought to be made subsidiary to the liquidation of a partnership, that title can not be divested or annulled by a collateral proceeding of the kind here resorted to, and can only be attacked by a direct action.

The defendant, Griffin, excepted that the plaintiff's petition sets forth no sufficient allegation in law to warrant the issuing of the in-

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junction or the appointment of a receiver; that the affidavit is not such as the law requires, is vague, uncertain, contradictory, and its allegations inconsistent; that the affidavit is false in charging that he ever received the rents and profits of the real estate described in the petition, since the sale of it to Edey, and that the defendant, in the purchase of said real estate, used the funds of the alleged partnership. On the trial of these exceptions they were overruled, and the rules made absolute, and from that judgment the defendants have appealed.

It appears that in 1865 the plaintiff, McKee, the defendant, Griffin, and two others, Bloomer and Graham, formed at Shreveport a commercial partnership, under the firm and style of S. P. Griffin & Co. The business of this partnership was declared to be the buying and selling of cotton, and the doing a commercial business generally. In the spring of 1866, McKee purchased the interest of Graham in the partnership. About two years afterwards, McKee and Bloomer both took the benefit of the bankrupt law, and subsequently purchased from the assignee in bankruptcy all the rights their estates had against S. P. Griffin and S. P. Griffin & Co. Bloomer sold the right he thus acquired to McKee, who, after becoming owner of all the claims of Graham, Bloomer and himself against S. P. Griffin and S. P. Griffin & Co., instituted this suit against S. P. Griffin, the other partner, and the absentee, Edey, as we have previously seen. The petition charges that a large amount of cotton was purchased in the States of Louisiana, Arkansas and Texas with the partnership funds; that Griffin sold this cotton and wrongfully converted the proceeds to his own use; that he purchased in his own name, with partnership funds, two fractional squares of ground in Shreveport at the price of \$40,000, and afterwards made improvements upon them with partnership funds to the amount of \$35,000. The plaintiff charges that the said real estate, and the improvements made upon it, were fraudulently conveyed by Griffin to his brother-in-law, Charles C. Edey; that the conveyance of this property was made without consideration, and with the intent to defraud the other members of the firm; that Edey knew that the purchase of the lots of ground in Shreveport by Griffin, and the improvements he made upon them, were all made with partnership funds, and that the conveyance to him operated a fraud upon the other partners. The petition expressly charges that Edey, the third party, is not a *bona fide* purchaser for a valuable consideration. It is contended that the other partners never consented to this transfer, and that Edey became a trustee for the partnership from the moment the property was transferred to him by Griffin. The plaintiff relies upon the case of *Baca v. Ramos et al.*, 10 La. 420, and that of *Hall v. Sprigg*, 7 Martin 244 as establishing this proposition.

By the laws of Louisiana a commercial partnership can not own immovable property. If immovable property be purchased in the name of the firm, the partners become joint owners. 3 La. 494. In the case of *Baca v. Ramos et al.*, real estate was acquired under title to Baca and Preba, under the firm and style of John Ramos & Co. In deciding that case, Judge Martin said:

"The partners were joint owners, and either of them might have sold his undivided share or interest in the property which was liable to seizure for his private debts. But in case of such seizure and sale he must have accounted to his partners for the price. * * * In fact, the title to one undivided third was in him, but the value thereof belonged to the partnership. The distinction we have taken between the title by which the property is held, and the value thereof, is well known in the other States of the Union where the common law prevails. These rights are there distinguished by the expressions 'legal title' and 'equitable title.' There courts of equity enforce the rights of the equitable owner by compelling the legal one to make a conveyance to the other, precisely as this court in the case of *Hall v. Sprigg*, 7 M. 243."

In various cases cited by counsel, the status or condition of immovable property, purchased in the name of a commercial partnership, is recognized as that of property owned jointly by the purchasers, and the principle enunciated in these decisions establish that if immovable property is purchased with partnership funds by one of the partners in his own name, and without the consent of his copartners, the property itself belongs to the partner purchasing, but its value at the time of the purchase belongs to the partnership. No decree of a court could be rendered to vest the title of property so purchased in the partnership, for the partnership is incapable of acquiring title.

In the aspect under which the case before us is presented, the title to the property purchased by defendant having been transferred to a third person, it is not necessary to determine whether the copartners, under the authority of the two cases relied upon, could compel the defendant, if he still held the legal title, to make a conveyance of it in joint ownership to the members of the firm. The case of *Hall v. Sprigg* was different from that of *Baca v. Ramos et al.* In the former, the defendant, as the agent of the plaintiff, with the plaintiff's money entrusted to him to purchase land, bought it in his own name with the plaintiff's money. The court decided that the unfaithful agent should convey the land to the plaintiff, who held the equitable title. In this case the plaintiff had the capacity to hold.

None of the cases, it seems to us, authorize the conclusion that the condition of the property would be the same in the hands of a third party in possession, under a title translatative of property, even if held

in bad faith. And we have grave doubt as to the right of the plaintiff in this case, under our laws, in a suit for the settlement of partnership business, to seize and take out of the possession of a third party, under title, real estate and enjoin him from using or disposing of it, and by this mode of action to subject it to the liquidation of the partnership affairs. This third party is not shown to be in any manner connected with the partnership, or in any manner connected with its affairs. The plaintiff asserts no privilege upon the property, nor does he allege the insolvency of the defendant. But it is alleged that the third party is collusively engaged with the defendant to screen the property purchased by the defendant with partnership funds from the reach of the copartners. By our laws, creditors who are injured by fraudulent and simulated sales, have their remedy by the revocatory action to annul and set them aside. In the case of simulated sales, judgment creditors, without other recourse, are allowed at their peril to make direct seizures of property under *fieri facias*, disregarding the mere paper title, by which no right of property passed to the pretended vendee. Yet we apprehend that this right can scarcely be claimed in a case like the one under consideration, the plaintiff not being a judgment creditor, and in fact not even showing that he is a creditor. He alleges that the defendant had a large amount of partnership funds in his hands, and appropriated them to his own use. He sues for a settlement of the partnership, and to compel the defendant, as a partner, to account to the partnership. Until a settlement is effected, it will not be known whether the defendant is a debtor to the partnership or not. We do not see that the plaintiff has greater rights than other creditors have under similar circumstances. In the case of *United States v. Smith*, 7 An. 187, where it was alleged that property of the defendant was fraudulently covered by title in the name of his son, an injunction was taken out, on affidavit of the plaintiff that defendant had no other property, and that there was reason to fear the property would be disposed of to the injury of the plaintiff. The injunction was dissolved on the ground that there was no authority or precedent for such a proceeding. In the case of *Talamon et al. v. Ytasse*, 4 Rob. 462, and in the case of *Barriere v. Fete*, 9 An. 536, the same ruling prevailed.

In an ordinary suit for the settlement of a commercial partnership brought by one of the partners against his copartners, the Code of Practice furnishes conservatory remedies that may be resorted to, as contingencies arise, to secure the partnership property and assets pending the settlement. But that real estate in possession of a third party, in no manner connected with the partnership, and under a recorded title translatif of property, can be taken out of the possession of the presumptive owner, and held subject to a decision of the

McKee v. Griffin et al.

litigation, and the party under title in the meantime restrained by injunction from using or disposing of the property, seem incompatible with our laws and the jurisprudence of the State. With these views of the facts in this case, we think the exceptions should have been sustained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; that the injunction be dissolved; that the appointment of a receiver be set aside and rendered of no effect, so far as he was authorized to take into his possession or under his control the property of the absentee, Edey; that the case be remanded to the court of the first instance to be proceeded with according to law, the plaintiff and appellee paying costs of this appeal.

Mr. Justice Howe dissents in this case.

No. 2864.—F. R. STEVENSON & CO. v. MRS. Z. E. A. RISER et al.

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A judgment that has been rendered on a citation addressed to and served upon a partner of the defendant, in a partnership not alleged or shown to be commercial, is an absolute nullity for want of citation. An hypothecary action to recover real estate incumbered by a judicial mortgage resulting from the recording of such judgment, will, therefore, fail, because the judgment being absolutely null for want of citation, the accessory obligation arising therefrom falls with it.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. John McKee*, for plaintiffs and appellants. *Rogers & Blanc*, for defendants and appellees.

Howe, J. This is an hypothecary action to subject land of defendant Mrs. Riser to the payment of a judgment alleged to have been obtained by the plaintiffs against George W. Genkins in the Third District Court of New Orleans. At the time the judgment was recorded in such a way as to act as a mortgage Genkins was owner of the land. The principal defense is that the judgment against Genkins was an absolute nullity for want of citation, and that defendants may urge this nullity as against the hypothecary claims of plaintiffs.

We are of opinion that the citation addressed to and served on the partner of Genkins, in a partnership not alleged or shown to be commercial, could not authorize a judgment against Genkins; that the judgment was an absolute nullity; and the accessory obligation herein sought to be enforced also absolutely null. 21 An. 27.

The cases cited by plaintiffs, announcing the doctrine that seizing creditors can not attack for fraud a judgment rendered long before their claims originated, do not seem to be in point in opposition to this view.

Judgment affirmed.

Rehearing refused.

Depass v. Esther Winter.

No. 3261.—SAMUEL DEPASS v. ESTHER WINTER.

This action was commenced by the husband for a separation from bed and board, on account of cruel treatment. The wife pleaded the general issue, and demanded in reconvention an absolute decree of divorce, on the ground of the adultery of the husband. On the trial the plaintiff failed to establish the allegation of his petition for separation while the defendant clearly made out a case of adultery against the plaintiff, her husband.

Held—That the plaintiff's petition must be dismissed, and that the prayer of the wife in reconvention must be granted, that a judgment of divorce *a vinculo matrimonii* must be granted in her favor and against her husband.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. E. Planchard*, for plaintiff and appellee. *Hudson & Fearn*, for defendant and appellant.

HOWE, J. Action for separation from bed and board on account of cruel treatment. Defense, a general denial, and a demand in reconvention for an absolute divorce on the ground of the adultery of plaintiff. Judgment for plaintiff, and appeal by defendant.

It is not necessary to rehearse at length the testimony. Much of it might make the unskillful laugh, but there is more to make the judicious grieve. The parties are upwards of sixty years of age and have been married nearly thirty years. Much of the testimony adduced by plaintiff refers to a period of from twelve to fifteen years prior to the time when he left the matrimonial domicile and commenced this action on the ground of "cruel treatment." One of these witnesses who knows nothing of what occurred after about 1853-54, some sixteen years before the suit was filed, gives his views at great length, and declares with oracular gravity that the wife made the life of the husband "insupportable," because she was in the habit of getting up very early and making a noise by scrubbing the banquet and performing other acts of domestic industry. The other witnesses on whom plaintiff relies, were neighbors for a few days only before the action was commenced. They prove that there was a quarrel between the parties just before the husband left the house; and the testimony for the defense shows a very natural reason for it. It shows clearly that the plaintiff had been living in the most shameless adultery with a kept mistress for several years, and had been lavishing upon her the earnings of his trade which should have gone into the community; and that the defendant only learned this fact a few days before this suit was brought. The plaintiff does not clearly establish a cause of action; while the defendant proves the foundation of her reconventional demand beyond all doubt.

The plaintiff pleads to the charge of adultery the prescription of one year; but its application is not perceived.

He also urges that the wife has condoned the offense, but it must be remembered that condonation of this kind, on the part of a wife, is not for obvious reasons to be established without grave and conclusive proof.

Depass v. Esther Winter.

In this case there is no proof. Indeed, as already stated, it appears quite clearly that the defendant first heard of the offense a few days before this action was begun, and the inference is fair that it was this revelation of her husband's infidelity which provoked the only important quarrel disclosed by the record.

It is therefore ordered that the judgment appealed from be reversed, that there be judgment in favor of the defendant Esther Winter and against the plaintiff Samuel Depass dismissing his petition and sustaining her reconventional demand; that the marriage heretofore contracted between the parties and the community of property be dissolved; that the inventory taken herein be homologated and made the basis of a partition of the community property; and that for the purpose of making a partition in accordance with such basis the cause be remanded to the lower court; the plaintiff to pay costs.

No. 2216.—ROBERT H. BAYLY v. THOMAS MCKNIGHT and R. K. WALKER.

A defendant who admits that he owes a debt which he has failed to pay, can not be relieved from the payment of the costs which the plaintiff has incurred in prosecuting his demand. In such a case, where no other defense is urged but that of the liability for costs, the appellant will be condemned to pay damages for frivolous appeal.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Roselius & Philips*, for plaintiff and appellee. *Richard Shackelford*, for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment on a promissory note, against them personally, and foreclosing the mortgage securing the same, on certain property described in the act of mortgage.

The defense is that the protest was not necessary, and the defendants should not be held liable therefor; also, that the defendants should not be taxed with the cost of the copy of the act of mortgage.

The note, made payable at the Canal Bank, was drawn to the order of the maker, McKnight, and endorsed in blank. It was also indorsed by the defendant, R. K. Walker. It was placed for collection in the Citizens' Bank, and duly protested for non-payment after presentation at the place of payment.

The defendants having failed to provide for the payment of the mortgage note, to which they have no substantial defense, with bad grace ask to be relieved from the costs which the plaintiff has incurred by reason of their fault.

We think the plaintiff should have the damages which he asks for frivolous appeal.

It is therefore ordered that the judgment be affirmed with costs. It is further ordered that the plaintiff recover of the defendants *in solido* ten per cent. damages on the amount of the judgment appealed from.

No. 3148.—M. E. BAIRD et als. v. A. LEMEE, Attorney of the Absent Heirs of MAHALA SPROWL et al.

The community resulting from marriage is not a partnership. A judgment creditor of the surviving spouse may, therefore, seize and sell an asset of the community in satisfaction of his demand, and the heirs of the deceased partner can not set up their residuary rights by way of injunction, and require the rules of partnership settlement of debts to be applied to the settlement of the debts of the community.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. R. J. Bowman*, for plaintiffs and appellees. *Chaplin, Morse & Chaplin*, for defendants and appellants.

WYLY, J. In the year 1859, during the lifetime of Mary W. Lawson, his wife, Daniel Brown, the father of plaintiffs, obtained in the suit entitled "A. V. Roberts, Administrator of the Succession of Samuel and Susan Quarles v. W. W. Brown et al.," No. 5050, a final judgment against the plaintiff in that suit for the sum of eighteen thousand dollars, besides interest, affirmed by the Supreme Court in 1860. 15 An. 696. On the thirtieth day of March, 1859, Daniel Brown was appointed and qualified as executor of the last will and testament of Mahala Sprowl, deceased. On the fifth day of January, 1860, the executor, D. Brown, sold at public sale all the property belonging to said succession. Mary Lawson, the wife of Daniel Brown, died in the month of April, 1860, and on the fifth day of February, 1866, Daniel Brown filed his final account of the administration of said succession of Mahala Sprowl. This account of administration (which contains evidence of the receipt by the executor, in cash, prior to the death of Mary Lawson, from sale of cotton, movables, etc.,) was opposed in the suit entitled "A. Lemee, Attorney of Absent Heirs, v. Daniel Brown, Executor," No. 6719, and a judgment was rendered against said executor for the sum of seventeen thousand seven hundred and ninety-three dollars, with interest. 21 An. 544.

On the twelfth October, 1869, a writ of *feri facias* was issued from the judgment in No. 6719 and all the right, title and interest of Daniel Brown in and to the judgment rendered in his favor in suit No. 5050, was seized on the fifteenth October, 1869, and advertised for sale on the fourth December, 1869. The plaintiffs in this suit obtained a writ of injunction to arrest the sale of the judgment under seizure. In their petition they allege, in substance, that the defendants in this suit are the creditors of Daniel Brown, individually; that the judgment in suit No. 5050, now under seizure, is a community asset, and is not liable to seizure for the individual debt of the surviving partner in community. They aver that an action of partition is pending between themselves and their father, Daniel Brown; that he is largely indebted to them on account of their interest in the community formerly existing between him and his wife, Mary Lawson; and they also claim damages for the wrongful seizure of said judgment

Baird et al. v. Lemce.

The defendants deny the indebtedness of Brown to the plaintiffs and aver that the judgment seized is liable for the debt due them by said Brown, which they allege is a community debt. They also pray for a dissolution of the injunction with damages and plead the prescription of one and four years to plaintiffs right of action.

The court gave judgment in favor of the plaintiffs, perpetuating the injunction, and the defendants have appealed.

The bill of exceptions taken by the plaintiffs to the ruling of the court in admitting evidence to prove that the judgment of the defendants against Daniel Brown was for a community debt, was not well taken. It was not received for the purpose of enlarging or diminishing the judgment, but to ascertain a fact raised in the pleadings, to wit: whether the debt on which the said judgment was founded was a community debt or not.

It is shown by the evidence that the debt on which the defendants' judgment is based was a community debt, and the judgment seized thereunder is a community asset.

"The community of property created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this code." C. C. 2778.

It is not subject to the rule of partnership which prevents the seizure of a particular asset belonging to it, and as to the creditors of the community the heirs of the deceased partner in community can not set up their residuary rights and require the rules of partnership settlement to be applied to the settlement of the debts of the community. If the community "be dissolved by the death of the wife, the survivor is generally alone applied to for the satisfaction of the community debts, and the wife or her representatives, although their distinct interest to the community attaches at the dissolution of the marriage, subject to their right to renounce and be exonerated from the payment of the community debts, have nothing to claim out of the acquets and gains until such debts are paid and liquidated." *Lawson v. Ripley*, 17 La. 246; 12 An. 222; 2 An. 30; 1 R. 378; 7 R. 393.

Our conclusion is that the judgment of the court perpetuating the injunction is erroneous.

It is therefore ordered that the judgment appealed from be avoided and annulled; and it is now ordered that the injunction be dissolved and there be judgment for the defendants, the plaintiffs paying costs of both courts.

Rehearing refused.

No. 2242.—R. H. DIXEY *v.* PATRICK IRWIN—CITIZENS' BANK,
Warrantor.

A party who removed from New Orleans to a foreign country and designated a person who resided here as his agent, and the agent died soon after he left, and he failed to designate another agent, and suit is brought against him to enforce a mortgage which he gave before leaving, by executory process, such party can not, on returning to the State after the property has been sold, and in a petitory action to recover it back from the purchaser at sheriff's sale, be heard to urge that the sale is null because it was made contradictorily with a curator *ad hoc* appointed by the court to represent him as an absentee, when, in law, he was not an absentee, but only temporarily absent. 19 An. 351; 21 An. 208.

The designation of a party appointed by the court to represent an absentee in executory proceedings as curator *ad hoc*, will not render void the proceedings, if it appear from the records of the court, or otherwise, that the party appointed is an attorney at law. 21 An. 692.

APPEAL from the Seventh District Court, parish of Orleans.
Collens, J. D. O. Labatt, for plaintiff and appellant. *T. Gilmore*, for defendant and appellee. *A. Pitot*, for intervenor

HOWE, J. This case is similar in many respects to that of same plaintiff against Mandell, lately decided in favor of defendants therein.

The position is framed apparently so as to include a suit for nullity of a judicial sale and a petitory action; but the plaintiff, in his brief, declares it is not a suit of nullity for reasons which he states, but is a petitory action asserting a superior title to the property in dispute to that of defendant. The plaintiff claims the property on the ground that the executory proceedings under which the Citizens' Bank undertook to enforce its mortgage debt against the plaintiff and caused to be sold the property, which was purchased by defendant, Irwin, were absolutely null and void, for want of proper citation, and that the court was without jurisdiction.

In this view of the case, as a petitory action, it is not necessary to examine all the points made by plaintiff, for some of them, though they might exhibit irregularities which could be considered in an action instituted with proper parties to annul a judgment or a judicial sale, can not be examined collaterally by a petitory action against a purchaser, certainly a purchaser like the defendant, who seems to have been in perfect good faith and to have paid a second price which has gone to discharge plaintiff's debts.

First—It is urged by plaintiff, appellant, that he was not an absentee in January, 1866, in such a sense as to authorize the appointment of an attorney or curator *ad hoc* to represent him in the executory proceedings.

The evidence shows that he sold his home in this city and left for Europe in 1864; that a few weeks after an agent he had in New Orleans died; that he remained abroad, year after year, unrepresented in Louisiana; and that in January, 1866, when the Citizens' Bank desired to collect its debt, it was necessary and proper to appoint a representative for him. 19 An. 351; 21 An. 208.

Dixey v. Irwin—Citizens' Bank, Warrantor.

Second—It is objected that a curator *ad hoc*, so-called, was appointed, and not an attorney. If by attorney is meant an advocate or lawyer, a member of the bar, it appears by the record that such a representative was appointed. 21 An. 693.

Third—It is objected that notice equivalent to citation was not served on the plaintiff, Dixey, through the attorney appointed to represent him. The record, and especially the return of the sheriff, shows that this point is made in error. The demand—or notice of order of seizure and sale—was regularly served. This was the important act, which has been decided to be so far assimilated to citation as to interrupt prescription. 20 An. 192, and cases there cited.

Fourth—The plaintiff contends that the property was never seized by the sheriff in the executory proceedings. The record shows a seizure according to the law applicable to the parish of Orleans. If there were irregularities they were relative merely.

It is urged that at the time of seizure the property was occupied by the military forces of the United States, and, therefore, no seizure could be made. Granting they did occupy at one time an office in one corner of the extensive premises, they permitted the seizure when first made; they did not and do not complain, and they gave up whatever possession they had some three months before the sale.

Fifth—It is contended that the notice of seizure of the property which was served on the attorney *ad hoc* was addressed to the plaintiff instead of to the attorney, and was, therefore, fatally defective. Granting that a defect in this respect would constitute the sale an absolute nullity, which is to say the least, doubtful, there was no defect in this case. The service was regular. 2 An. 158.

On the whole we find no error in the decision of the lower judge, and It is therefore ordered that the judgment appealed from be affirmed, with costs.

Rehearing refused.

No. 2259.—JAMES MARTIN v. W. W. WASHBURN and J. J. HAGGERTY.

The obligation of a lessee to the lessor to keep in repair the premises leased, does not authorize the co-tenant to sue him for damages occasioned by defects inherent in the cistern on the leased premises.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Walter H. Rogers*, for plaintiff and appellee. *Budd & Grover*, for Haggerty, appellee. *Race, Foster & E. T. Merrick*, for defendant and appellant.

LUDELING, C. J. The plaintiff sued the defendants for damages occasioned by the bursting of a cistern filled with water, which flooded his shoe store.

 Martin v. Washburn and Haggerty.

Martin and Washburn were lessees of Haggerty; Martin had the first floor and Washburn the upper stories of the same building.

Opposite the third story was a cistern which rested on a brick wall, and from this cistern both tenants used water. Haggerty alleges that Washburn obligated himself to keep the property leased in repair, and that he is bound in warranty to him, should he be held responsible for the damages, and, further, he alleges that the cistern belonged to Washburn.

There was judgment against W. W. Washburn for \$650 and costs of suit. Washburn *alone* has appealed.

The evidence does not establish that Washburn owned the cistern, nor does the obligation of Washburn to the lessor to keep in repair the premises leased, authorize a co-tenant to sue him for damages occasioned by defects inherent in the cistern on the leased premises. But, aside from this, we are of opinion that the plaintiff has failed to prove the amount of damages occasioned him by the bursting of the cistern. The evidence is conjectural and unsatisfactory.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the district court be annulled, and that there be judgment in favor of defendant, Washburn, rejecting the plaintiff's demand, with costs of both courts.

No. 3141.—CARROLL, HOY & CO. v. MRS. M. A. DAVIDSON.

An executor or administrator has no power to bind the estate by giving notes, signed officially, for debts contracted during the time of the administration. If, therefore, the administratrix give her notes in favor of a merchant for supplies furnished to carry on the plantation after the succession is opened, she may be held personally liable thereon, but the estate she represents is not bound, because she has not the authority by virtue of her office of administratrix to contract such debts on behalf of the estate she represents. 21 An. 286.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter*, for plaintiffs and appellees. *Ryan & White*, for defendant and appellant.

HOWELL, J. Plaintiffs sue the defendant individually on two notes signed by her as administratrix of the estate of N. Davidson. The defense is that the plaintiffs were the factors of her husband, Neal Davidson, before the late war; that the whole of the debt represented by said notes was in the form of an account against said Davidson for supplies, etc., furnished him during his life; that after she qualified as administratrix the amount was presented to her as a claim against the estate of the deceased, and at the request of plaintiffs she acknowledged it to be such by the notes sued on, and that she can not be made responsible for the debts of her deceased husband.

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It is shown that Neal Davidson died in 1863; that the accounts made out in the name of the estate of Neal Davidson, and for which the notes were given, ran from August 12, 1865, to July 10, 1866, and from July 30, 1866, to July 1, 1867, and were for supplies furnished the plantation which belonged to the succession of the deceased, but cultivated under the management of the defendant, through her oldest son, of age, there being some minor children; that on the eleventh May, 1866, the defendant applied for the appointment as administratrix, and on the same day, without any publication, the order appointing her such, and directing an inventory to be made, was granted by the clerk of the court, and on the twenty-eighth of said month she furnished a bond; that on the sixteenth of September, 1869, she filed an account or tableau of debts, including one in her own favor of over \$6000, and one in favor of plaintiffs of \$2202, but not the two notes sued on; and that on the second of February, 1870, the whole property of the succession was sold and purchased by her; that in the correspondence of plaintiffs they advised the defendant's son "to have the estate placed under administration, so that it could be legally used in raising money to carry it through the making of a crop," and requested the notes to be signed by defendant as administratrix.

The question arises, do these facts show that plaintiffs gave credit to and dealt with the succession of Neal Davidson in regard to these notes, and estop them from holding the administratrix individually liable? We think not. Plaintiffs evidently did not intend a liberality, and the fact that they thought that the administration could be legally used to raise money for making a crop, did not change the law of successions and the powers and responsibilities of administrators. It is no longer an open question that executors or other administrators can not, in any transaction in which they pretend to act as such, create any liability on the estates represented by them. They have power to acknowledge existing debts or liabilities, but not to create them. If it should be necessary to conduct a plantation for the benefit of a succession during the time necessary for settling it up, special authority may be obtained from the court to do so, and thus bind the estate for current expenses. But to permit an administrator indefinitely to carry on the planting business and annually increase the indebtedness of the estate, would give him the power to ruin the estate irretrievably.

The argument that plaintiffs gave credit to the succession, and must be held to a recourse upon the succession, is more specious than solid. This doctrine applies when the contracting parties are actually or apparently capable of contracting. But a succession can not make a contract. It must be represented, and its representative has only the powers specially conferred and those necessarily incident to the carrying out or exercise of such as are conferred. In all cases where

administrators have given notes, the creditors were affected with knowledge as much as in this case, and acted voluntarily in taking the notes, and yet the successions were relieved from liability, and the administrators were held responsible, except in a few where the notes were given for debts existing at the date of opening the successions, and the notes were considered simply as acknowledgments of the debts. Such were the cases of *Gillett v. Rashal*, 9 R. 276, and *Bank of Louisiana v. Dejean*, 12 R. 16, cited by counsel for defendant. In the other four cases quoted by them, the parties relieved were agents, and acted as such to the knowledge of the creditors giving the credit.

In the case of *Livingston v. Gaussen*, 21 An. 286, we examined the cases in which this question was raised, and recognized the distinction between those where the debt was created by the deceased and those where it originated pending the administration. In this case the defense seems to have been prepared with reference to the doctrine announced in that, but the evidence does not sustain the defense. It is not proven, as alleged, that the supplies were furnished in the lifetime of the husband, while it is shown that the wife is now the owner of all the property left by the husband, under a sale provoked by herself, notwithstanding the irregularity of her appointment. Our conclusion is that this case is in the category of those where representatives of successions have been held responsible personally on notes given in their representative capacity, and it is therefore unnecessary to pass on the bills of exception taken by the plaintiffs in the court below.

It is ordered that the judgment appealed from be reversed, and that plaintiffs recover of defendant, Martha A. Davidson, the sum of \$4500, with eight per cent. interest from sixteenth December, 1866, and the further sum of \$3282 91, with like interest from first January, 1868, and costs in both courts. .

ON REHEARING.

HOWELL, J. On a rehearing of this case, we deem it better to present the main question in the following form: Do the facts that the accounts were opened and kept in the name of the succession of Neal Davidson, and the notes given in settlement thereof, signed by the defendant as administratrix, preclude plaintiffs from holding the defendant individually liable?

As before said, we think the jurisprudence of this State maintains the negative. See 5 N. S. 530; 8 N. S. 451; 2 La. 188; 1 R. 119; 9 R. 276; 12 R. 16; 8 An. 432; 9 An. 130; 21 An. 286; 22 An. 293, 371.

When the account was opened, the defendant had not been appointed (nor any one else) to administer, and hence had no authority to represent or bind the succession, and her subsequent appointment, even if

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it had been regular, could not make the debt one against the succession, and the error of plaintiffs as to her capacity or authority had no such effect. The mistake of defendant's counsel is in supposing that credit could, under the circumstances, have been given to the succession. The account and the notes, are only evidence in different forms, of the extent of an obligation, and if the defendant could not create the obligation on the part of the succession, her consent that the account should be made in the name of the succession and to give the notes as administratrix, could have no such effect, and having so dealt with plaintiffs without legal authority, she rendered herself personally liable for the supplies furnished by them and received and used by her.

It is therefore ordered that our judgment remain undisturbed.

Mr. Justice Wyly dissents, for reasons to be filed.

WYLY, J., *dissenting*. The important question in this case is, to whom was credit given by the plaintiffs? If it was given to the estate of Neal Davidson, the debt represented by the notes is not the individual debt of the defendant, Mrs. M. A. Davidson.

An acknowledgment in the form of a note given by the legal representative of a succession for a succession debt, does not bind the fiduciary individually. 9 R. 276; 12 R. 16.

In the absence of proof to the contrary, the presumption is that credit was given to the fiduciary individually, and the words administrator or executor added to the note evidencing the debt will be regarded as mere surplusage.

When I read the letters of Carroll, Hoy & Co. in the record, which were addressed to the son of Mrs. Davidson, who was managing for his mother the plantation belonging to the estate for which the advances were made, I have no doubt as to whom credit was given. It was unquestionably given to the estate of Neal Davidson. Whether wisely or not, is not the question.

On the sixth of April, 1866, the plaintiffs addressed the son of Mrs. Davidson the following letter:

"DEAR SIR—We are in receipt of your favors of twenty-sixth and thirtieth ultimo, and have sent you the supplies requested—cost to debit of estate of Neal Davidson, \$769 10. We would advise you to apply to your uncle, Colonel Hunter, to have the estate placed under administratorship, so that it could be legally used in raising money to carry it through the making of a crop. We are not advancing to any one, but are disposed to aid you as far as we can; and if you do not succeed in raising the money to pay the labor wages from the source you expect to, we will endeavor to raise it for you on an administration note. Yours, truly,

CARROLL, HOY & CO."

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On the twenty-third July, 1867, the plaintiffs also wrote to the son of Mrs. Davidson, managing the plantation of the estate, the following letter:

“DEAR SIR—We enclose statement of the estate of Neal Davidson’s account, made up to the first instant, showing balance due us of \$3062 04, which we trust may be found correct. To cover this balance, with commissions and interest, we enclose a note, at six months from the first instant, for \$3282 91, which please request your mother to sign as administratrix, and return to us. We hope your crop may escape the dreaded caterpillar. Yours, truly,

CARROLL, HOY & CO., in liquidation.”

In another letter to the same party, I also find this clause:

“We enclose also note filled up to close the old account, which please get your mother to sign as administratrix of the estate of Neal Davidson, and return to us at your early convenience. We handed you the account when you were here.”

It is shown that the notes sued on evidence the amount due on two accounts against the estate of Neal Davidson. They represented the debt stated in those accounts. Now, the reason of the rule that an agent creating a debt without the authority of his principal, binds himself, is this: The agent has the means of knowing the extent of his authority, which the party with whom he contracts is not presumed to have; and if a party inducing another to contract with him as agent, without having adequate authority to bind his principal, is to escape liability, it will then be in his power to perpetrate a fraud; and uncertainty as to the extent of the powers of fiduciaries would greatly embarrass commerce, if the latter were not held responsible on contracts executed without authority from their principals.

But if a person contract with an agent knowing the full extent of the powers of the latter, and also that the latter does not intend to bind himself, but only his principal, the rule I have stated will not apply to such agent in case it turn out that his powers were not sufficient to bind his principal, because credit alone was given to the principal by a party contracting with full knowledge of the extent of the powers of the agent. No fraud could be perpetrated in such a case, and there is no reason for the application of the rule. In contracting with a public officer, credit is presumed to be given to the government which he represents, and the parties contracting with him are presumed to know the extent of his powers to bind his principal. Hence the rule stated has no application to such a case, there being no doubt as to whom credit was intended to be given, and no presumed want of knowledge as to the extent of the powers of the officer contracted with. In such a case, no fraud could be perpetrated.

Now, in the case before us there is no doubt that credit was intended

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to be given, and actually was given, to the estate of Neal Davidson, and the notes sued on were signed by the defendant as administratrix of the estate of Neal Davidson, to cover a debt in the account of Carroll, Hoy & Co. against said estate, at the instance and request and under the advice of the plaintiffs. The notes, then, merely evidence the debt. Whether it can be enforced or not, is immaterial. One contracting with a minor, is his creditor for whatever the latter may owe him, regardless of his ability to enforce the collection of the same. In this case no fraud could have been practiced, because credit was given to the estate, and not to the administratrix, and the powers of the latter are fixed in the law, which all persons are presumed to know. Hence there is no reason for the rule, and I do not think it applies to this case. Where the reason of a law ceases, the law itself should cease.

I therefore dissent in this case.

No. 2921.—STATE OF LOUISIANA v. BENJAMIN FORREST

In a criminal case the accused is entitled to an appeal from the verdict of the jury and the judgment of the court thereon, if the offense charged is of sufficient magnitude to give the appellate court jurisdiction, without reserving bills of exceptions during the progress of the trial, or making a motion in arrest of judgment or making a formal assignment of errors apparent on the face of the record. 13 An. 486, 489.

Except for the crimes of murder, arson, robbery, forgery and counterfeiting, all prosecutions must be commenced by the finding of the indictment or by filing the information within one year next after the offense shall have been committed. Revised Statutes of 1870, § 986. Therefore if the accused has been tried and convicted of the crime of horse stealing, and has taken an appeal therefrom, the verdict will be set aside and the judgment of the court below reversed, if the record shows that the information was not filed until more than one year had elapsed after the offense was committed.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. M. A. Estevan*, District Attorney, for the State. *J. T. Howell*, for defendant and appellant.

LUDELING, C. J. The information, filed in this case on the eighth of November, 1869, charged the defendant with having stolen a horse on or about the first day of January, 1863. He was convicted and sentenced, and he has appealed. There was no motion to quash the information, no bill of exceptions taken during the progress of the trial, no motion in arrest of judgment, nor formal assignment of errors on the face of the record.

But upon the authority of the cases of *State v. Henderson* and *State v. Conner*, 13 An. 486 and 489, which favor the liberty of the citizen, we feel it to be our duty to entertain the appeal.

It is not charged that the prisoner had fled from justice, or that the crime was not discovered or denounced until within one year before the information was filed. Except under these circumstances, the law prescribes that "no person shall be prosecuted, tried or punished for any offense, willful murder, arson, robbery, forgery and counterfeiting

93	433
51	1648

23	433
113	208

23	433
123	438

excepted, unless the indictment or presentment for the same be found or exhibited within one year next after the offense shall be done or committed," etc. Revised Statutes of 1870, p. 195, § 986.

The conviction was on an information which is clearly insufficient, as more than one year had elapsed between the commission of the offense and the prosecution.

It is therefore ordered that the verdict of the jury be set aside, and that the judgment of the district court be arrested.

No. 2232.—JOHN A. STEVENSON v. JOHN G. PRATHER et als

The sale by an absentee of a part interest in a steamboat, to a resident of the State, will not defeat the right of attachment which the creditor had against the boat for a debt which the absentee had contracted before the sale; the right of the creditor to the writ of attachment against the boat being in no wise impaired by a sale of a part thereof to a resident of the State, who was afterward taken into the firm as a commercial partner.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Given Campbell*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendants and appellants.

LUDELING, C. J. This suit was commenced by attaching the interests or shares of three of the owners of the steamboat *Bart Able*, on a debt created by them, before W. C. Harrison, the other joint owner of the boat, had acquired an interest in the boat.

W. C. Harrison moved to dissolve the attachment, on the ground that the owners were commercial partners, and he resided in this State. There was judgment maintaining the attachment, and the defendants appealed.

The defendants cite the cases of *Converse. Kennett & Co. v. Steamer Lucy Robinson*, 15 An. 434; 2 An. 962; 5 An. 262; 13 An. 290, and 10 An. 726, in support of the position assumed by them in asking to have the attachment dissolved. If the debt sued upon had been contracted by the partnership, of which W. C. Harrison formed a member, these authorities would be in point. But the evidence shows that the debt was contracted by John G. Prather, W. G. Thorwegen and J. W. Terrill, before Harrison became a part owner of the steamboat, or connected with the partnership engaged in running the boat.

In the case of *Owen v. Davis*, 15 An. 22, this court recognized the right of the creditors of the absent joint owners of a steamboat to attach their shares, and to have a privilege resulting from the attachment, entitling them to be paid by preference over the ordinary creditors of the commercial partnership engaged in running the boat.

The law authorizes the property of an absent debtor to be attached in this State. It would be singular if by transferring an undivided interest in the property, the debtor could deprive the creditor of this right against his remaining interest.

It is therefore ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 3229.—E. B. PENDLETON v. EATON & BARSTOW and Sheriff.

An act of sale of personal property, consisting of goods, wares and merchandise in a store, in block, without fixing a price or delivery, is null as against a seizing creditor, and a third party, who claims to have purchased such goods before the seizure, who resorts to the equitable remedy of injunction to stay the sale thereof on the ground of ownership in himself under his purchase, will be condemned to pay the highest rate of exemplary damages for his abuse of the equitable remedies which are given by the law to enable parties to protect themselves against unjust attacks.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter and William A. Seay*, for plaintiff and appellee. *H. S. Losee*, for defendants and appellants.

LUDELING, C. J. The plaintiff, claiming to be the owner of certain personal property seized under an execution issued in the suit of *Eaton & Barstow v. John Frazer*, enjoined the sale thereof.

The exception to the jurisdiction of the court, *ratione materiae*, was properly overruled; the property seized exceeds in value five hundred dollars.

On the trial the plaintiff offered in evidence an act of sale passed before a notary public a few days before the seizure, but recorded only after the seizure, to the reception whereof the defendant objected on the ground that the same was not recorded until after the seizure, and that the petition for injunction does not allege any such act existed. The judge *a quo* received the evidence, and we think properly. The objection that the act was not recorded goes to the effect rather than to the admissibility of the evidence. The objection that the plaintiff did not set forth how he became the owner, has no force.

The defendant took another bill of exceptions to the ruling of the district judge excluding evidence to show that, several days after the transfer to Pendleton, the plaintiff in injunction, the debtor, Fraser, had settled with H. S. Losee for one of the accounts which was included in the sale to Pendleton, by having the amount thereof credited on a debt due by himself, on the ground that Pendleton was not a party to that act, that any one had a right to pay the debt of another, and that the fact was irrelevant. We think the fact should have been permitted to be proved. Fraud and simulation may be proved by any means in the power of the party alleging either. And this act of receipting an account alleged to have been sold to another, in consideration of receiving a credit on a debt due by himself, showed how one of the parties to the simulation regarded it, and it further explained the nature of Fraser's possession.

An examination of the evidence has convinced us that the plaintiff has failed to establish any right to the property seized. The only evidence offered by him to prove his title is a written act passed before a notary public a few days before the seizure, and not recorded until after the seizure, and his own testimony that "for his own convenience

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he left Fraser as his agent in charge of the business during his absence. He visited the store whenever he came to town, and Fraser conducted the business as his agent."

The evidence shows that a sale of all the goods and accounts, *en globo*, was made by Fraser, who remained in possession and carried on the business without any perceptible change. The sign over the door, "J. Fraser," remained the same after as before the sale, and no delivery of the property seems ever to have been made to Pendleton, and no price is proved to have been paid.

"It is the duty of the court to mulct in exemplary damages those who wantonly abuse the equitable remedy of injunction." 11 La. 486; 2 An. 360; 5 An. 155.

It is therefore ordered that the judgment of the district court be annulled, and that the defendants, Eaton & Barstow, recover from the plaintiff, Eugene B. Pendleton, and his surety, Moses Mayer, *in solido*, twenty per centum on the amount of the judgment enjoined, as damages, and costs of both courts.

Rehearing refused.

No. 2296.—JAMES MEAGHER v. A. B. READING.

A promise to sell a lot of cotton is void as against an innocent third purchaser, to whom it was subsequently sold and delivered, if the price had not been paid and the cotton delivered before the second sale and delivery.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Hays & New* and *O. Roselius*, for plaintiff and appellee. *Samuel R. Walker*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment condemning him to deliver to the plaintiff one hundred and twenty-four bales of cotton, sequestered as the property of the latter.

The ownership of the property claimed by the plaintiff is not satisfactorily established by the evidence.

That the plaintiff made an agreement with A. P. Bush, of Hines county, Mississippi, for the purchase of the cotton in 1863, there is no doubt, and that this contract was modified by a verbal agreement between the same parties in 1865, there is no doubt; but the evidence fails to satisfy us that the promise to sell was ever consummated by the payment of the price and by delivery of the thing.

It is true Bush testifies that he made the delivery, but this contradicts his sworn statement in the suit of *Bush v. Birdsong*, in the County Court of Warren county, Mississippi, where this identical property was in contestation, and he recovered it in May, 1866, upon his affidavit that he was the owner thereof, a copy of the said proceedings being in evidence. The delivery is also contradicted by his sworn statements

Meagher v. Reading.

and by other proof in the suit of James Meagher v. A. P. Bush et als., in the Special Court of Equity, at Jackson, Mississippi, in July, 1865, in which the validity of the said purchase was involved, a copy of said proceedings also being in evidence.

There is no doubt that the defendant obtained the cotton from Bush under the contract of sale made by the latter to one Mahone, in 1865, from whom the defendant acquired title. This cotton having been seized and taken from the defendant by process of court in Warren county, Mississippi, and subsequently released by the County Court of said county to the said Bush, was by the latter redelivered to the defendant, and by him shipped to this city.

We think the plaintiff has failed to make out his case.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is ordered that there be judgment for the defendant, plaintiff paying all costs.

Rehearing refused.

No. 2232.—CARONDELET CANAL NAVIGATION COMPANY v. Widow DE ST. ROMES.

The defendant can not be permitted to question the validity of the claim on which a judgment has been rendered in a suit to revive it, the object of revival being only to interrupt the current of prescription. Revised statutes of 1870, section 2813.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. C. Dufour* and *H. D. Ogden*, for plaintiff and appellee. *Charvet & Duplantier*, for defendant and appellant.

LUDELING, C. J. This is an action to revive a judgment under the act of 1853.

The defendant avers that she was not legally cited, and that she never signed, nor authorized any one to sign for her, the obligation sued upon.

The record shows that she was legally cited. It is therefore unnecessary to decide whether, in an action of this kind, the irregularity of the original proceedings on account of a want of citation, can be inquired into. The second grounds should have been urged and established before judgment.

The object of this proceeding is merely to keep in force the judgment rendered in 1859 by interrupting prescription. Acts of 1853, Ray's Revised Statutes, section 2813. The verity of the obligation sued on is established by the original judgment—it is *res judicata*.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

Mr. Associate Justice Howell recused.

No. 2226.—A. N. DENOUVION, Tutrix, *v.* HODGSON & LYTLE et al.

An agreement by which the leased property has been taken back by the lessor and relet to another party for a portion of the time of the first lease, will discharge the surety of the first lessee, unless it be shown that he consented to the change. 5 R. 213.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiff and appellee. *A. Saucier*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, by her agent, leased to Hodgson & Lytle the Delta Warehouse, with the lots around it, and the appurtenances, etc., for the term of one year, commencing on the first of June, 1868, and to end on the thirty-first of May, 1869, for the aggregate sum of \$6800, at the rate of \$500 per month for the first four months, and at the rate of \$600 per month for each succeeding month. The lease was made by notarial act.

The plaintiff alleges that George W. Hynson, who is also sued with Hodgson & Lytle, bound himself as their sureties to the extent of \$2000, and that this obligation as surety for the payment of the rent was entered into verbally by Hynson in presence of witnesses.

The parties plead separate answers, the substance of which is that the plaintiff, by taking back the leased premises and letting them to other parties, annulled the contract. The answer of Hynson denies having entered into any contract as with plaintiff as alleged, and if he did so contract, he was released by the act of plaintiff in taking possession of the property and leasing it to other parties without his consent. Judgment was rendered against Hodgson & Lytle, *in solido*, for \$5450, with legal interest, etc., and against Hynson for \$2000, with legal interest from first January, 1869. From this judgment Hynson alone appeals.

It is shown that about the first of December next ensuing the date of the lease, the lessees refused to keep the leased property longer, and that Hodgson tendered possession of it to the plaintiff's agent, offering him at the time the keys of the buildings. The agent, it seems, with some hesitation took the keys and handed them over to Knower, of the firm of Knower & Walden, to whom the agent afterward leased the property from and after the first of December, 1868. In taking the property back, the agent informed Hodgson that in doing so it was not his intention to release Hodgson & Lytle or Hynson from their obligations under the contract. Hynson, it is not shown, was a party to this arrangement. Neither does it appear that he knew anything about it, or ever consented to it.

Hynson places his defense upon this ground, and also that a promise to pay the debt of another can only be established by written evidence. It is held on the part of the plaintiff that a distinction is to be taken

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between a promise to pay the debt of another and an obligation to become merely the surety of another. This question we do not feel called upon to decide, as we think by the *laches* of the plaintiff in not obtaining the consent of the party alleged to have been surety of the lessees to the new lease, he was thereby released. Articles 2675, 2676, 2677, 2679 and 3030 of the Civil Code; 5 Rob. 213.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment for the defendant, the plaintiff and appellee paying costs in both courts.

No. 3116.—FANNIE C. OLIVER AND HUSBAND v. L. B. DAYRIES,
Sheriff, et al.

A sale of a plantation by the husband to the wife whereby the wife, in payment, credits her judgment against her husband for a portion of the price and for the balance she assumes and obligates herself to pay certain mortgages which her husband has placed on the plantation, is absolutely null and void, and conveys no title whatever to the wife, because the wife is prohibited from assuming or contracting to pay the debts of her husband. C. C. 1790.

In such a case the obligation of the seller is vitiated as well as that of the buyer, and the fact that a portion of the price of the place paid by the wife was permitted and was legal, will not render valid the sale so as to drive the mortgage creditors to the direct action of nullity.

The seizure and sale by the mortgage creditors of the husband can not, therefore, be stayed by the writ of injunction taken out by the wife, founded on her ownership and title to the plantation as transferred to her by her husband.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Miller, J. John Yoist*, for plaintiffs and appellees. *Thomas N. Hughes*, for defendants and appellants.

WYLY, J. On the ninth of January, 1867, the plaintiff obtained a judgment of separation of property and for \$37,500 against her husband, Aristide Bienvenu. On the fifteenth of January, 1867, the said Bienvenu transferred to his said wife a plantation in the parish of Pointe Coupée for the consideration and price of \$25,000, payable as follows: \$5419 50 cash, for which "Mrs. Bienvenu grants her husband a partial acquittance and discharge as so much paid on account of her judgment against him," and for the balance of the price she assumed the payment of certain mortgage notes given by her husband, bearing on said property, amounting to \$19,580 43. On the eighteenth of March, 1867, the same property was seized under a writ of *feri facias* issued against her husband on the judgment of James Inness v. A. Bienvenu, on the docket of the district court of the parish of Pointe Coupée, the debt upon which the judgment of the said Inness was based being the same assumed by the said Mrs. Bienvenu as part of the purchase price in the conveyance from her said husband.

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This suit was instituted to arrest said sale, and an injunction was sued out for that purpose by the plaintiff herein on the following grounds:

First—That the judgment rendered in the suit of Inness v. Bienvenu, No. 892, under which the *feri facias* was issued, was null and void, the defendant being a resident of New Orleans, having never been cited nor made any appearance therein.

Second—That the mortgage granted by A. Bienvenu to Inness on the third March, 1859, had lost its rank for want of reinscription, having been first recorded on the first of April, 1859, and was not reinscribed until the twenty-third May, 1870.

Third—The plaintiff, Mrs. Bienvenu, is owner of the property under a valid and recorded title, and it can not be seized under a *feri facias* issued against her husband; that if liable at all for the claim of Inness against her husband, he must proceed by the hypothecary action.

The answer of the defendant, Inness, contains a general denial, alleges the judgment of Inness against Bienvenu to be good and valid, denies the failure to reinscribe mortgage, and alleges that plaintiff, Mrs. Bienvenu, acquired the property from her husband by act passed on the fifteenth January, 1867, and assumed therein the payment of the notes and mortgage due by her husband on the property; that this act was duly recorded on the twenty-second January, 1867, "whereby the mortgage contained in the act of third March, 1856, was duly reinscribed."

The defendant also pleads in reconvention the assumpsit of plaintiff, contained in the act of sale of the property by her husband of the fifteenth January, 1867, and asks for judgment thereon against her for \$4676 96, besides interest.

The court held that the husband had acquiesced in the judgment obtained against him by Inness in suit No. 892, and that the grounds of nullity set up can not, therefore, be urged now by plaintiff in injunction against it.

The court also decided that the mortgage contained in the act of sale from Inness to Bienvenu of the third March, 1859, had lost its rank by the failure to reinscribe it, and that the plaintiff is not bound on her assumpsit to pay the same as a debt of her husband.

Judgment was rendered, making the injunction perpetual and dismissing the claim in reconvention. Inness, the defendant in injunction, has appealed.

The main question in this controversy is, to whom does the property under seizure belong?

If it belongs to her husband, the plaintiff has no right to enjoin its sale by his judgment creditor, even though she have a superior mortgage thereon, and if, on the other hand, she owns the property, of

course she has the right to restrain its sale by a judgment creditor of her husband enforcing a mortgage against it that has perempted by failing to reinscribe it, and she has also the right to set up the nullity of the judgment under which her property is seized.

The plaintiff derived title from her husband and she is resisting the claim of her husband's vendor, which she assumed as part of the price.

It is very clear that the plaintiff's assumpsit of \$19,580 of her husband's debts, as part of the price, is prohibited by article 2412 of the Civil Code; and by article 1784, contracts between the husband and the wife are forbidden. The only exception is found in article 2421, which declares that :

"A contract of sale between husband and wife can take place only in the three following cases :

"*First*—When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.

"*Second*—When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.

"*Third*—When the wife makes a transfer of property to her husband in payment of a sum promised to him as a dowry." * * *

Now, the plaintiff contends that her obligation to pay \$19,580 as part of the price, is an absolute nullity ; but that the sale is nevertheless valid because the other part of the price, to wit: \$5419 50, was duly credited on her judgment against her husband, and she is protected by that clause in article 2421 which permits one spouse to make a transfer to the other, who is judicially separated, in payment of his or her rights.

If this principle be correct, the effect would be the same if the credit upon plaintiff's judgment had only been one dollar or one cent, and thus for an insignificant sum \$25,000 worth of property of her husband, indeed his whole estate, might be transferred to her, and it would be a valid giving in payment, although not one-thousandth part of the consideration or price was paid. The same prohibition which the plaintiff invokes, to wit: articles 1784 and 2412, to vitiate her obligation to pay the \$19,580 50, operates with like effect upon the corresponding obligation of the husband. Article 1784, which prohibits the contract, vitiates the obligation of the seller as well as the obligation of the buyer, and what is done in contravention of a prohibitory law is an absolute nullity. But the plaintiff claims ownership because of the consideration of \$5419 50, which was credited on her judgment against her husband. To this we reply, your title rests upon a conventional sale and your vendor never consented to sell you the thing, worth \$25,000, for the sum of \$5419 50 ; and if your title

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be maintained the court will be enforcing a contract which the parties never made. The sale is an entirety—the price, the thing and the consent; it can not be both null and valid; and we can not say that the plaintiff ought to have a share of the plantation equal to the valid part of the price, because the parties in the act never consented to convey an interest or share, but the thing consented to be conveyed was the plantation; a corporeal, not an incorporeal, was the object of the contract of sale before us.

Our conclusion is, that this sale, made in contravention of a prohibitory law, is an absolute nullity, and the title of the property never passed out of the husband of the plaintiff. The thing seized is, therefore, liable to the pursuit of the judgment creditor of the owner.

It is therefore ordered that the judgment appealed from be avoided and annulled; and it is now ordered that the injunction herein be dissolved and the suit be dismissed at the costs of the plaintiff in both courts.

No. 2025.—ALFRED MARCHAND v. H. T. COFFEE and WALLACE & CO.

In a suit against the maker and indorser of a promissory note, the note of evidence of the clerk of the court below must show, in order to bind the indorser, that the certificate of notice to the indorser was offered separately from that of the note and protest. Therefore if the note of the evidence only shows that the note and protest were offered, the indorser can not be held, even though the certificate of notice be attached to the act of protest and the entire document be annexed to the petition. An indorser can only be bound by evidence offered at the trial to show his liability, and he is never in fault for not making objection to the reception of evidence until such testimony is offered as will fix his liability if unrebutted.

APPEAL from the Seventh District Court, parish of Orleans.
Collens, J. Hornor & Benedict, for plaintiff and appellee. *H. D. Ogden*, for defendants and appellants.

TALIAFERRO, J. The defendants are sued, the one as drawer and the others as indorsers of a promissory note for the sum of two thousand dollars. The defendants, Wallace & Co., called in warranty, *D. G. Cook*, who in his answer excepts to the call on the ground that Wallace & Co. do not pretend that the respondent ever had any dealings with them, or that he ever entered into any contract with them in relation to the note sued on, or ever assumed the payment of their obligation thereon as indorsers.

Judgment was rendered as prayed for and the defendants have appealed.

We see no force in the defense. The indorsers introduced no evidence of any kind to show liability resting on Cook in relation to the note.

It is ordered that the judgment of the district court be affirmed

with costs, and that the plaintiff recover one hundred and fifty dollars from the defendants, Wallace & Co., as damages for a frivolous appeal, and that they pay the costs of this appeal.

ON REHEARING.

HOWELL, J. On the rehearing granted in this case to Wallace & Co., who are sued as indorsers of a promissory note, we are called on to decide whether or not, where a note and protest are shown, by the clerk's minutes of evidence, to have been offered, the certificate of notice, annexed with the other instruments to the petition and found in the transcript of appeal, is to be deemed such part of the protest as to be included in the offering and making proof against the indorsers, and whether as a consequence the note or minute of evidence, made by the clerk on the trial, must show specifically what is offered and received in evidence.

The first proposition must be answered in the negative, and the second in the affirmative.

The certificate of notice is not a part of the protest, but a mode of proof, established by law, that the indorser is notified of the protest having been made, and which the notary is authorized to add to the protest. Revised Statute, § 2508.

It can not be assimilated to the signatures to a note or private writing or considered as forming an essential part thereof and of course admitted to be genuine if no objection is made to the admission of such note or writing. The general denial admits the signature, but not the liability as indorser, which must be established by specific proof, distinct from the note and protest.

There seem to be manifest propriety and necessity that the minute of evidence should show what evidence is offered and received and by whom offered; otherwise it would be in the power of the transcribing clerk to make evidence for the parties. Every document filed in a suit is not necessarily evidence, and the appellate court must know what evidence is introduced by the parties respectively. Articles 476, 477, 482, 483, C. P., require that each party shall produce the witnesses and the evidence in support of his demand or defense, and shall have the opportunity to object to the introduction of testimony, documents or other written proofs, and until offered, there is no occasion to object. It is the duty of the clerk to keep an accurate minute of the proceedings had, the evidence adduced and, where required by either party, to take down the testimony in writing, in order that a full and correct transcript may be made. All this we think is necessarily implied and even enjoined by the provisions of the above

Marchand v. Coffee and Wallace & Co.

articles of the Code of Practice and articles 585, 589, 896, 898 and 899. See also 21 An. 335. In a case like this, the indorser may be silent until evidence is adduced to fix his liability and he can not fairly be charged with raising a frivolous objection, when he urges that no evidence has been introduced by plaintiff to establish his liability.

We think the case should be remanded.

It is therefore ordered that our former decree as to defendants, Wallace & Co., be set aside, that the judgment against them be reversed and the cause remanded as to them to be proceeded in according to law. Plaintiff to pay costs of appeal.

No. 2289.—ALBERT BALDWIN v. TERESA I. SEWELL.

If the consideration of a promissory note be shown to be Confederate treasury notes, it can not be recovered from the maker, even though the holder be a third person, who acquired it in good faith, for a valuable consideration, before maturity. Constitution, article 127; 21 An. 569.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. W. Huntington*, for plaintiff and appellee. *Fellows & Mills*, for defendant and appellant.

LUDELING, C. J. This is an action on several promissory notes. The demand is resisted on the ground, among others, that the notes were given for Confederate money loaned to the maker.

The testimony of Poole, the notary who prepared the act of mortgage given to secure the payment of the notes, proves that the lender or his agent left with him \$15,000 in Confederate money to be delivered to the borrower, Sewell, when the mortgage was executed; that he deposited those Confederate treasury notes in the Canal Bank, and on the next day, after the mortgage was executed, he gave Sewell his check on the bank for the \$15,000 which he had deposited.

It appears further, from the evidence in the record, that Baldwin, the plaintiff, was fully cognizant of the nature of the transaction between the lender and the borrower, and he can not now pretend to be a *bona fide* purchaser for value, before maturity. But even if he had been a *bona fide* purchaser for value, and before maturity, he could not recover in the courts of this State. Constitution, article 127; *Groves v. Clark & Carnal*, 21 An. 569.

It is therefore ordered that the judgment of the district court be avoided, and that there be judgment rejecting the plaintiff's demand, with costs.

Rehearing refused.

 Tourne v. Mathieu.

No. 1725.—EUGENE TOURNE v. JULES A. MATHIEU.

Parol evidence is inadmissible to contradict or vary a written agreement of the parties.

APPEAL from the Sixth District Court, parish of Orleans. *Duplantier, J. A. L. Tissot*, for plaintiff and appellee. *Lacey & Butler*, for defendant appellant.

WYLY, J. The defendant has appealed from a judgment against him on a promissory note. The defense is "that said note was given with the understanding that valid and legal letters patent would be furnished by plaintiff, covering certain inventions and improvements for manipulating in fine qualities of cotton, animal and vegetable bodies in general, viz: the desiccation and drying of these substances; that legal and valid letters patent have not been obtained and furnished by plaintiff, and that by reason thereof the consideration of said note (if any ever existed, which is denied), has failed."

The evidence does not support the defense. The letters patent were obtained by the plaintiff according to the written agreement previously entered into between him and the defendant, and the patent had already been issued when the defendant gave the note. The judge did not err in refusing the introduction of parol testimony to contradict the written agreement of the parties, and the defendant's bill of exceptions was not well taken.

The evidence shows that the plaintiff complied with his agreement with the defendant in reference to obtaining the patent, and that there is no valid defense to the note.

Let the judgment be affirmed with costs.

Rehearing refused

 No. 3086.—STATE OF LOUISIANA v. G. W. CAMPBELL

The burden of the taxes and charges on real estate falls on the lessor, and not on the lessee.

If, therefore, the property is exempt from taxation in the hands of the lessor, no taxes can be imposed thereon against the lessee.

APPEAL from the Third District Court, parish of Orleans. *Emerson, J. S. Belden*, Attorney General, and *Hornor & Benedict*, for plaintiff and appellant. *Marr & Foute*, for defendant and appellee.

WYLY, J. This is a suit against the defendant to recover the State taxes for 1869 on "a lot of ground forming the corner of St. Charles and Julia streets, measuring 108 by 160 feet, in square No. 217, bounded by St. Charles, Julia, Carondelet and St. Joseph streets."

The answer is that the defendant is not the owner of the lot of ground described in the petition; that said lot belongs, and for forty years has belonged to the "Poydras Female Orphan Asylum," and is by law exempt from taxation; that on or about the thirty-first day of March,

1859, the said Poydras Female Orphan Asylum, by notarial act, leased the said lot of ground to the defendant for the term of fifty years, and that there was no stipulation that the defendant shall pay the taxes or other real charges on said lot, and by the express terms of article 2672 of the Civil Code, the lessor, and not the lessee, must bear all the real charges and taxes upon the thing leased. The court gave judgment for the defendant, and the plaintiff has appealed.

We do not find a note of evidence in the record, or that any evidence whatever was introduced to support the demand of the plaintiff. We find, however, in the record the contract of lease from the "Poydras Female Asylum" to the defendant. Whether it was received in evidence or not, we are not informed by the record.

We see no reason to disturb the judgment appealed from.

Judgment affirmed.

Rehearing refused.

23 446
112 480

No. 3222.—J. A. S. BECKHAM v. JOHN HENDERSON—Heirs of A. D. PALMER. Warrantors.

The heir becomes seized of the succession by operation of law from the moment that it is opened by the death of the ancestors, and before taking any steps to put himself in possession, or expressing a willingness to accept, and even though ignorant that the succession has been opened in his favor. Prescription is therefore suspended by the fact of minority from the date that the succession falls to the heir until his majority.

If the court has jurisdiction, the informalities prior to a decree of sale of succession property are cured, and the purchaser is protected against such irregularities. But if property be sold under such decree that belongs to another, and does not belong to the succession, then and in that case the owner of such property cannot be precluded from showing the facts and recovering his own.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Cross & Hardee*, for plaintiff and appellee. *McVea & Kilbourne*, for defendants and appellants.

This case was tried by a jury in the court below.

HOWE, J. In the year 1831 or 1832, John A. Beckham, the father of plaintiff, married Jane Coleman, who died in 1836, leaving an infant child, Rosana Jane Beckham. On the first of November, 1838, he married Lucy L. Smith, who died on the second of March, 1841, leaving no other descendant but plaintiff; and in September of the same year plaintiff's father also died, leaving but the two children, to wit: Rosana by his first wife, Jane Coleman and plaintiff by his last wife, Lucy Smith. In the year 1852 Rosana died, being at the time of her death about fifteen or sixteen years old. The plaintiff claims that his father purchased this land during the lifetime of his first wife, Jane Coleman, and at her death, Rosana, her only surviving child, became the owner of an undivided half of the same, and at Rosana's death

plaintiff inherited all of her rights. It is not claimed that plaintiff or his half sister, Rosana, was ever divested of the title to this land by any proceeding contradictorily with either of them; but the answer alleges that the defendant purchased the land from A. D. Palmer on the twentieth of March, 1853; that A. D. Palmer purchased from Adam Palmer on the seventh May, 1849, and that Adam Palmer purchased it at the probate sale of John A. Beckham, deceased, and that the same was sold under a regular decree of the court to pay debts. This probate sale was made on the first of July, 1848, and the land was sold as the property of John A. Beckham, deceased.

The case was submitted to a jury, whose verdict is embodied in the decree of the court, recognizing the plaintiff as the owner of one undivided half of the land, and fixing the value of the improvements at \$1000, one-half of which was to be paid by plaintiff.

There was judgment in favor of the defendants against the warrantors for \$2530, and both defendants and the warrantors have appealed. In argument, they rely upon the following grounds of defense for a reversal of the judgment:

First—The prescription of ten years.

Second—That their title to the entire tract of land is perfect, they having in good faith purchased the same at judicial sale made under and in conformity with the decree of a court having jurisdiction.

I. Upon the point of prescription, they urge that the plaintiff was twenty-seven years old when suit was filed, and that six years of prescription had unquestionably accrued in favor of appellants; that from the death of Jane Coleman, in 1836, until 1855, when the statute was passed which by operation of law accepted the succession for plaintiff with benefit of inventory [acts of 1855, 144], her succession was vacant; that prescription runs against a vacant succession; that Adam Palmer bought and entered into possession in July, 1848, and that six years and eight months elapsed before the legal acceptance of the succession for the plaintiff, by act of March, 1855; that this acceptance did not interrupt but suspended prescription, and that, therefore, adding the two periods together, we have twelve years and eight months of time during which prescription ran between the possession of Adam Palmer and the beginning of the suit.

The answer to this ingenious but unsound argument is that the succession of Jane Coleman was not vacant, as contended for. The authority cited to prove that it was, *Poultney v. Cecil*, 8 La. 321, was decided under the Code of 1808. If that code were still in force, the appellants' syllogism would be less defective. But under the Code of 1825 the heir becomes seized of the succession by operation of law from the moment it is opened by the death of the ancestor, before taking any steps to put himself in possession, or expressing any will-

ingness to accept, and even though ignorant that the succession has been opened in his favor: C. C. 934, 939. And, therefore, in the case of *Calvit v. Mulhollan*, the facts of which were practically identical with those in the case at bar, it was held that prescription was suspended by the fact of minority after June 20, 1825, the date of promulgation of the latter code. The plea of prescription must therefore fail.

II. Upon the second point the appellants urge that the property in dispute was inventoried as the property of John A. Beckham; that his administrator applied for and obtained a decree to sell the same to pay debts; that the decree came from a competent court; that the sale was made and Adam Palmer became the purchaser; that he sold to A. D. Palmer, and A. D. Palmer to the present possessor, John Henderson, and that this decree, under which the probate sale was made, protects the purchaser in such a way as to give him title, not only to the portion of the land which belonged to John A. Beckham's succession at the moment of sale, but to the portion which at that moment belonged to some one else; and in support of this position we are referred to the case of *Lalamie's Heirs v. Moreau*, 13 L. 431, and to other cases which follow the principle there settled. We do not understand the decision cited, and the numerous decisions which have been based upon it, to settle any other principles than these—that informalities prior to a decree would not cause it to be a nullity, the court having jurisdiction, and that such a decree cures preceding irregularities, and as to them protects the purchaser. But we have not been referred to any authority, nor do we think any ought to exist, declaring a decree of sale in the succession of A, and a sale thereunder of property which belongs, not to A's succession, but to B, can preclude B from showing the facts and recovering his own.

Judgment affirmed.

No. 2217.—H. C. CADY v. MYRA CLARK GAINES

The defendant having admitted in the answer, that the indorser was the owner of the note, can not in a suit by the holder, urge the defense that the signature of the indorser is not proved, and that the holder can not therefore recover.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. G. Schmidt*, for plaintiff and appellee. *Fellows & Mills*, for defendant and appellant.

HOWE, J. Suit on a promissory note for \$5000, drawn by defendant to the order of James Emott, and by him indorsed. Defense, exception of *lis pendens*, general denial, and a special denial of the legal ownership and possession of the note by plaintiff.

First—The exception of *lis pendens* is abandoned.

Second—The averment of the defendant that the note belongs to

Cady v. Myra Clark Gaines.

James Emott, and not to plaintiff, if it could constitute any defense, is not established, but on the contrary is disproved.

Third—The point made that the plaintiff has not proved the indorsement of Emott, and therefore has not proved the transfer of the note to himself, is untenable. In her answer the defendant admits her signature to the note, and proceeds to declare, "that since its maturity, James Emott, the indorser of said note, as owner thereof obtained possession of the same," etc. The attorney of plaintiff, called as a witness by defendant, proved also that the note was sent to him for suit by James Emott, on behalf of the plaintiff.

The appeal is clearly for delay. Let the judgment be affirmed with five per cent. damages for frivolous appeal and costs.

No. 3292.—CITY OF NEW ORLEANS v. HOME MUTUAL INSURANCE COMPANY.

23 449
112 227

An ordinance of the city of New Orleans which fixes the amount of license which each insurance company must pay on the basis of the amount of the premium received by each company is unequal and not uniform. It is, therefore, unconstitutional and void. Constitution, art. 118.

The license imposed by the municipalities or the State on persons pursuing the same profession, occupation or calling must be equal and uniform; otherwise their payment can not be enforced.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Rufus Waples*, Assistant City Attorney, for plaintiff and appellant. *Randolph, Singleton & Browne*, for defendant and appellee.

LUDELING, C. J. This action was brought to recover two thousand and sixty dollars, the amount of the license tax claimed of defendant, under an ordinance of the city of New Orleans.

The defendant avers that the ordinance is "unequal, unjust, and contrary to the constitution of this State."

There was judgment in favor of the defendant and the plaintiff appealed.

The ordinance provides, that the insurance companies doing business in the city, shall pay a license as follows:

Where the premium received for the year 1869, after deducting re-insurance, return premiums, and internal revenue, shall be one million dollars or over, six thousand dollars (\$6000); eight hundred thousand dollars and under one million dollars, five thousand dollars (\$5000); six hundred thousand dollars and under eight hundred thousand dollars, four thousand dollars (\$4000); four hundred thousand dollars and under six hundred thousand dollars, three thousand dollars (\$3000); three hundred thousand dollars and under four hundred thousand dollars, two thousand dollars (\$2000); two hundred and

fifty thousand dollars and under three hundred thousand dollars, fifteen hundred dollars (\$1500); two hundred thousand dollars and under two hundred and fifty thousand dollars, twelve hundred and fifty dollars (\$1250); one hundred and fifty thousand dollars and under two hundred thousand dollars, one thousand dollars (\$1000); under one hundred and fifty thousand dollars, seven hundred and fifty dollars (\$750)."

The tax imposed is for a license to carry on a business or occupation. It is the price exacted for the privilege to pursue a profession, trade or occupation.

The constitution requires that a *license tax* as well as a tax on property shall be equal and uniform. To be equal and uniform the tax imposed must be the same upon all who engage in the particular profession or calling taxed, without reference to the abilities, fortunes or successes of those engaging in business taxed. 10 An. 56, Municipality No. 2 v. Dubois & Mish; 11 An. 739, Police Jury v. Nogues; 20 An. 373, Parish of Orleans v. Cochrane.

The ordinance in question fixes unequal taxes upon persons pursuing the same occupation. It is therefore unconstitutional and void. Article 118.

It is ordered that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 1529.—SHEPHERD BROOKS v. HUGH MONTGOMERY et al.

The sale of property which has been seized by the Marshal of the United States, under a writ of *fi. facias* which has issued from the Circuit Court thereof, can not be enjoined by a State court, on the allegation of a third party that the property seized belongs to him, and is not that of the defendant in the suit under which the *fi. fa.* issued. In all cases of this kind the court which issued the original process by which the seizure was made, has the exclusive right to determine its jurisdiction in the case.

APPEAL from the Fifth District Court, parish of Orleans. *Duplantier, J. Hays & New and Semmes & Mott*, for plaintiff and appellant. *J. H. Halsey*, for defendants and appellees.

WYLY, J. The plaintiff has appealed from the judgment dissolving the injunction sued out by him in the Fifth District Court of New Orleans, to restrain the sale of certain property seized by the Marshal, under a *fi. fa.* issued on the judgment of *Hugh Montgomery v. Henry Shepherd, Jr.*, in the Circuit Court of the United States, on the ground that said property belongs to him and not to the judgment debtor.

The question is, can a party enjoin in a State court the process of a United States court, on the allegation that the thing seized belongs to him and not to the person against whom the writ is directed? We think that he can not. The court issuing the process ought to have

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the right to determine its jurisdiction as to the thing seized thereunder, in order to avoid conflict between the Federal and State courts. The two systems of judicature could not be administered in harmony in the same State if the jurisdiction of the court of one system, as to the person or thing seized by its process, is to be measured by the court of the other.

This question was elaborately examined by the Supreme Court of the United States in the case of *Freeman v. Howe*, 24 Howard 453, where a number of railroad cars, attached by process of the United States Circuit Court, were taken out of the possession of the Marshal by the Sheriff, under a writ of replevin issued by a court in the State of Massachusetts; and the court held that whether the railroad cars which were seized were or were not the property of the railroad company, was a question for the United States court which had issued the process to determine; that although both parties to the replevin were citizens of Massachusetts, yet the plaintiffs were not remediless in the Federal courts. They should have filed a bill on the equity side of the court from which the process of attachment issued, which bill would not have been an original suit, but supplementary merely to the original suit out of which it had arisen; it would, therefore, have been within the jurisdiction of the court, and the proper remedy to have been pursued.

For the reasons stated, and on the authority of the case referred to, we think the court below did not err in declining the jurisdiction.

Let the judgment be affirmed, with costs.

No. 2201.—E. A. WENTZEL v. ROBINSON & REID et al.

Defendants obtained injunctions from the courts of Louisiana prohibiting all other persons from selling Anchor oil in the State, predicated on the ground that the exclusive right to sell said oil within the State, which has been patented under the patent laws of the United States, belonged to them. The injunctions were dissolved on the ground that no patent for the Anchor oil was shown.

Held—That the defendants, who had enjoined the sale of a certain kind of oil within the limits of the State, on the allegation that they held the patent and exclusive right to sell such oil, and having failed on trial to show their exclusive right or the patent, they and their sureties on the injunction bonds were liable, *in solido*, for the damages caused by the illegal injunctions thus obtained.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Murphy & Lambert*, for plaintiff and appellee. *R. & H. Marr* and *J. N. Brickell*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sued for damages caused, as he avers, by the illegal and unwarrantable interference by the defendants with his exclusive right, under patent, of selling within the State of Louisiana and other States adjacent, a certain illuminating fluid known as "Anchor oil."

The defendants admit that they enjoined the plaintiff from selling the Anchor oil, but aver that they did so under the belief that they possessed the exclusive right of vending it within the State, and not through malice towards the plaintiff. Judgment was rendered in the court below against the defendants, Robinson & Reid, *in solido*, for \$550, and against Lacompt, one of their sureties on the injunction bond, for \$245 of said sum. From this judgment the defendants appealed.

The facts seem to be that Wentzel, who is a dealer in lamps and lamp oil, purchased, in 1868, from one Hollister, of Cleveland, Ohio, the inventor or discoverer of the Anchor oil, the sole privilege of selling it in the State of Louisiana, for which he paid \$1000.

The defendants, alleging themselves to be the assignees of Coats & Co., represented as the real patentees for the manufacture of this kind of oil, and averring that they had purchased the sole right of selling it in Louisiana and the adjacent States, sued out a writ of injunction inhibiting and restraining Wentzel from selling or disposing of Anchor oil in the State of Louisiana. A sharp litigation followed, which was kept up for several months. Wentzel took a rule against the defendants to set aside their injunction on the ground of the insufficiency of the surety on the injunction bond, in which he succeeded. A counter rule was taken by defendants to set aside the order which Wentzel had obtained, allowing him to continue to sell Anchor oil *pendente lite*, upon giving security. Robinson & Reid obtained a second injunction against Wentzel on the same ground upon which he took out the first, giving a solvent surety on their second bond. The defendants' suit was dismissed, on the ground that they failed to prove that the "Anchor oil" had been patented, and therefore they could not have acquired, as alleged, the exclusive right of vending it in Louisiana.

The plaintiff, we think, has established his right to damages. The defendants signally failed to sustain the allegations set forth in their petitions for injunctions against the plaintiff. Coats & Co. never had any right to sell the exclusive privilege of vending the article, and it seems, by the admission of one of the defendants, that they never used any effort to ascertain whether Coats & Co. had such right. The defense is put purely on technical grounds. It is insisted on the part of the defendants that this action is exclusively founded upon the allegation that the conduct of defendants toward the plaintiff was prompted by malicious feelings, and that the plaintiff has failed to make good his charge of malice.

It is true the prayer of the plaintiff's petition contains the allegation that the defendants' proceedings are illegal and malicious, and it is lacking in clearness and precision, yet it sufficiently appears that his claim is upon the injunction bonds. The petition specially alleges

that the two sureties are responsible to plaintiff on the bonds. The prayer of the petition is for judgment, *in solido*, against the defendants and the sureties, "as above set forth," and the injunction bonds are introduced in evidence.

We see no reason for disturbing the judgment, and it is therefore ordered that it be affirmed, with costs in both courts

Rehearing refused.

No. 3126.—ELIZA C. JOHNSON *v.* J. F. TACNEAU.

Horses, mules, and other work animals, together with farming implements used on a plantation in making the crop and belonging to the lessee stand as a pledge to the lessor for the payment of the rent. The pledge thus given and accorded to the lessor on the team, implements, etc., used in making the crop need not be recorded to give it effect. A different rule however, governs with regard to the privilege on the crop for advances made, and supplies furnished to make it. In the latter case, if the lessor make advances and desires to preserve his privilege on the crop and other property on the place, he must have the lease recorded, as required by law.

APPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Posey, J. Barrow & Pope*, for plaintiff and appellee. *Andrew S. Herron* and *Albert Voorhies*, for intervenor, appellant.

LUDELING, C. J. Mrs. Johnson leased her plantation to J. F. Tacneau, during the year 1867, for twenty-seven hundred and fifty dollars. She also undertook to advance a certain sum of money for supplies for the plantation. At the expiration of the lease, the rent not having been paid, Mrs Johnson had twenty-one mules and a lot of farming implements (which had been employed in the cultivation of the place), provisionally seized to secure the payment of the rent. Charles Faurie, Jr., intervened, and claimed to be the owner of the mules, and prayed for damages done him by the seizure of his property.

In answer to this intervention, Mrs. Johnson averred that Faurie was a partner of Tacneau, the defendant, in the planting operation, and that as such he was bound jointly for the rent, and she prayed for judgment accordingly.

It appears from the record, that Tacneau induced Faurie to purchase the mules and implements which were on the leased premises, in order to enable him to cultivate the plantation, and he agreed to give Faurie one-half of the net proceeds of the crop raised on the place for the use of the mules and utensils. Faurie contends that this was a contract of lease, while Mrs. Johnson insists it was a contract of partnership.

It is immaterial in this suit what may be the character of the contract as between the parties to it; for, if it be a lease, the property having been used to cultivate the plantation and having been seized on the place, is subject to the lessor's privilege and pledge. 21 An. 553; 20 An. 266. If it be a partnership contract, the plaintiff did not

Eliza C. Johnson v. Tacneau.

lease to the partnership, but to Tacneau individually. 22 An. 268. It seems, therefore, only necessary to determine whether or not the lessor had a right to seize the property of Faurie on the plantation.

There is nothing in the record to show that the lease was ever recorded, and if the plaintiff had had only a privilege to secure the payment of the rent this omission would have been fatal.

But article 2705 of the Civil Code declares that "the lessor has, for the payment of his rent and other obligations of the lease, *a right of pledge* on the movable effects of the lessee, which are found on the premises leased. In the case of predial estates, this right embraces everything that serves for the labors of the farm," etc. 21 An. 553.

There is no law which requires the contract, which gives the right of pledge, to be registered. C. C. article 3218. We think the imputations of payment were lawfully made.

It is therefore ordered and adjudged that the judgment of the lower court against the intervenor be annulled, and that in other respects it be affirmed; and that the costs of this appeal be paid by the appellee.

Rehearing refused.

No. 2195.—SMITH, NEWMAN & CO. v. J. M. ISAACS et als.

The holder of a promissory note who has acquired possession of the same before maturity as collateral security for the payment of a pre-existing debt, has the right to sue for and recover the whole amount thereof, notwithstanding the equities that may exist between the maker and the original payee. In such a case the person holding the note as collateral security is placed upon the same footing as that of any other innocent third holder of negotiable paper before maturity.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Gibson & Austin*, for plaintiffs and appellees. *D. C. Labatt*, for defendants and appellants.

WYLY, J. Isaacs, the maker, and A. A. Nevins and Forstall & De Lassus, the indorsers, have appealed from a judgment against them on the promissory note sued on by the plaintiffs.

The plaintiffs received the note before maturity from the payee, A. A. Nevins, as collateral security for a pre-existing debt due them by him, and it is shown that Nevins is still indebted to them in a sum exceeding the amount of the note.

They have the right to sue for and recover the whole amount of the note, and are not bound by the equities existing between Isaacs, the maker, and Nevins, the payee. See the Succession of Dolhonde, 21 An. 3, and the authorities there cited.

The plaintiffs are not conditional holders as contended for by the defendant, Isaacs, nor were they bound to credit the debt due them by Nevins with the amount of the note in order to be considered holders before maturity for value and to avoid the equities existing

Smith, Newman & Co. v. Isaacs et al.

between the original parties. A pawnee before maturity for a pre-existing debt is a holder for a valuable consideration in the sense of the rule applicable to negotiable instruments, and in a suit to collect the note pledged, he is not bound by the equities existing between the maker and payee. Had the plaintiffs credited Nevins with the amount of the note, they would have become the absolute owners of the instrument. But not doing so and holding it as collateral security, they are the pawnees. In either case the holders for a valuable consideration before maturity are not bound by the equities existing between the original parties.

As to the indorsers, we think, from the evidence, that they were duly notified of the dishonor of the note, and their liability is fixed.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

No. 3244.—In the Matter of the Succession of P. A. KUGLER.

A policy of insurance on the life of a man, taken out in favor of his wife and children, vests the rights to the policy in them from the date of its execution.

The written acknowledgment of a debt by a deceased person made before his death, being first proved, parol evidence is then admissible to show that no other debt was due to the creditor than the one presented.

A promise to pay notes, after prescription has accrued thereon, which are secured by mortgage, creates a new debt, evidenced by the notes, but it does not revive the mortgage which has perempted by the prescription of the notes. Therefore, if notes which are secured by a mortgage have prescribed, and the debtor has afterward acknowledged them, they become an ordinary debt only.

A PPEAL from the Parish Court of East Baton Rouge. *G. M. Husted*, Parish Judge. *S. P. Greves*, for administrator, appellee. *A. S. Herron and Favrot & Lamon*, for opponents and appellants.

LUDELING, C. J. This is an appeal from a judgment homologating the final account of the administrator of the succession of P. A. Kugler.

The administrator has filed an answer, praying that the judgment in his favor be amended by allowing the widow and minors one thousand dollars under the homestead act of 1852.

The evidence in the record shows that the life of the deceased was insured in favor of his wife and children, and that they received one thousand dollars from the insurance company after his death. It is contended by the counsel for the administrator that at the moment of the death of Kugler the widow and children were in indigent circumstances, and that the subsequent payment of the policy did not affect their rights, under the law, at the period of the husband's death.

We think the rights of the widow and children to the policy existed before the death, and that the liability of the insurance company became fixed and exigible by the death of the insured, and, therefore,

23	455
46	248
23	455
47	901
23	455
50	1039
23	455
109	365

the widow and children owned, in their own right, one thousand dollars when Kugler died.

The item forty-five of the account, being two mortgage notes for eight hundred dollars each, is opposed on the ground that they were prescribed.

The notes were due on the first of July, 1859, and on the sixteenth of May, 1860. On their face they were prescribed. To prove an interruption of prescription the administrator offered parol evidence to show that the credits indorsed on the notes were made at the dates when they purport to have been made. The evidence was properly rejected. Acts of 1858, p. 138; Succession of Hildebrandt, 21 An. 350.

To establish a promise to pay these debts a letter of the deceased to Phillips was introduced in evidence, and then parol evidence was offered to prove that the deceased owed no other debt to Phillips but the notes. This was competent evidence. It is the acknowledgment or promise of the deceased which the law requires to be proved by the writing and signature of the deceased. When an acknowledgment and promise in writing and under the signature of the deceased is proved, it is competent to show by testimony that no other debt was due the party to whom the promise was made.

We think the letter and the oral evidence in the record establish the promise to pay the two notes embraced in item forty-five of the account. But the promise to pay was made after prescription had accrued. This created a new debt, binding on the deceased and his succession; but it did not renew or create a mortgage, at least as to third persons. C. C. 3285 (3252); 1 An. 330, Lathet v. Hogan et al.; 2 An. 927, Grayson, Tutor, v. Mayo.

The other items of the account were correctly allowed.

H. V. Babin, for the use of the succession of A. M. Dunn and of Louis Favrot, alone having appealed, we can change the judgment of the court *a qua* only in his favor, and not as between the appellees.

It is therefore ordered and adjudged that the judgment of the parish court, so far as it allows a preference to the notes included in item forty-five of the account over the claim of H. V. Babin, for the use of the succession of A. M. Dunn and Louis Favrot, be avoided and annulled; and that, in all other respects, it be affirmed, the costs of this appeal to be paid by the succession.

ON REHEARING.

LUDELING, C. J. We held that the notes included in item forty-five of the account had been renewed by a promise to pay them after prescription had accrued, and that this renewal of the obligation did not create or renew the mortgage given to secure the old obligations; and

Succession of Kugler.

we ordered that the tableau be amended in so far as it accorded a preference to the said notes held by Phillips. In the application for rehearing we are asked to decide that the appellants' claim shall be paid by preference over Phillips'. We can not do so. Both are ordinary claims, and, under the law, must be paid *pro rata* out of the funds of the estate.

Rehearing refused.

No. 1711.—JOHN T. HARRIS *v.* S. L. NASITS & BROTHER.

In the sale of tobacco or other merchandise the *lex loci contractus* governs; therefore a contract of sale of a lot of tobacco in New York to a merchant residing in New Orleans, will be construed with reference to the laws and customs of that place which govern and regulate such transactions.

It being shown to be the custom in New York among tobacco merchants, to close a transaction of the sale of a lot of tobacco at once and without reclamation, and it being shown in this case that that custom was observed, and that the purchaser examined the tobacco itself before purchasing, and having given his written acceptance in payment thereof, he could not be allowed thereafter to resist the payment of the draft given on the ground that the tobacco was unsound and worthless.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Bradford, Lea & Finney*, for plaintiff and appellee. *J. S. Whitaker & Rice*, for defendants and appellants.

TALIAFERRO, J. This suit is brought on a draft drawn by the plaintiff on the defendants and by them accepted for \$1334 14. The defense is failure of consideration. Defendants aver that the draft was accepted for the purpose of paying for a lot of tobacco purchased by one of the firm, but the tobacco when opened was found to be in a bad condition, being funky, moldy and unsound. For the reason that the quality of the article proved not to be equal to that shown by samples, when the purchase was made, the defendants allege that they promptly notified the seller to take the article back, as it was of no value to them, and that they should not pay for it. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

The sale took place in New York. It is in proof that one of the defendants examined the quality of the tobacco which was in boxes. There were in the whole lot ninety boxes. Half the lot was purchased. Samples were first shown to Nasits and another tobacco merchant of New Orleans. They with the plaintiff's salesman then went to a room in an upper story of the building and at the instance of the buyers several boxes were opened and the quality proved satisfactory. The salesman testifies that Nasits was distinctly informed that if he desired to examine the tobacco any further he could do so; that if he purchased, the transaction was to be at once closed and that no reclamation would be allowed; that the tobacco was not sold by samples but upon the personal inspection of the buyer; that he

Harris v. Nasita & Brother.

could have had every box opened if he desired it, but that he did not require any further examination. This witness said under cross examination that the tobacco did not belong to his employer but to another person for whom the plaintiff had agreed to sell it; that he knew the lot was not strictly sound, but as it did not belong to Mr. Harris he did not feel at liberty to make any statements concerning it, and therefore sold the lot as it was, the purchaser to make his own examination. It was fully established to be the usage or custom in New York for the purchaser to pass definitely on tobacco before delivery; that if sold by samples he comes and examines as much of the tobacco or as many boxes as he desires, and then decides finally upon the trade. After delivery no drawback or reclamation on account of defects or deficiencies in quality are allowed. The *lex loci contractus* governs in the decision of this case and not the provisions of our code. It is fully established that one of the defendants, the partner who made the purchase was informed at the time of purchasing, of this usage or custom in New York, and bought under the conditions it imposes.

We think the judgment was properly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused

No. 2212.—HENRY DITTMER & THEO. PELLE v. GERMANIA INSURANCE COMPANY of New Orleans.

The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous conditions or specifications of the hazards. Therefore an act done by the assured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk.

In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured, without giving notice to the insurers. Held—That, although unbaled hay was not specially excepted from the hazards, yet from its very nature the risk was increased, and therefore, it avoided the policy on that ground.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. Howard McCaleb*, for plaintiffs and appellants. *J. M. Dirrhammer* and *O. E. Schmidt*, for defendant and appellee.

TALIAFERRO, J. Dittmer insured to the amount of \$2000 his stock of groceries, wines and liquors, and to the extent of \$500 on his fixtures and furniture, all contained in a frame shingled building in the town of Carrollton. Eight months afterwards the premises were entirely destroyed by fire, causing the total loss of his stock in trade, furniture, etc., which as alleged were worth at the time the fire occurred, over \$2500. The defendants being the insurers were sued on the policy of insurance for \$2500, with interest, etc.

Dittmer & Pelle v. Germania Insurance Company.

The defense is, that Dittmer, after he had effected the insurance, stored in the premises a quantity of unbaled hay, and kept it there until the fire, thereby acting in bad faith and materially increasing the risk of the defendants, in violation of the contract by which he was insured, rendering according to its conditions the policy null and void.

The defendants had judgment in the court below, and the plaintiffs have appealed.

It is in proof that after the policy was taken out, Dittmer, the plaintiff, permitted one of his neighbors to store within the insured premises a large quantity of loose, unbaled hay. It seems to have been put in the upper story of the building insured, and to have been placed there about three months before the fire occurred. The witness Lieble, who owned it, says that there were about four thousand pounds of the hay in the building at the time of the fire, and that it was perfectly dry. The plaintiff contends that as "hay pressed in bales" is expressly named and classed as hazardous and excepted in the conditions annexed to the policy, and unbaled or loose hay not being so classed and specified it can not be considered as excepted, and that the policy is not thereby void. An express condition stipulated by the insurers is, that the plaintiff should not in any manner increase the danger and risk of fire on his premises during the continuance of the policy. The insurance company was not informed of the storing of the hay in the building insured, and no application was made for the assent of the company to its being so stored, and no opportunity offered the insurers to require as a condition for continuing the policy in force, a higher or increased premium.

We think the doctrine contended for on the part of the plaintiff is not maintained. We think it an established rule that the provision in a policy of insurance against an increase of risk by acts of the assured is an independent condition of itself, and is not to be controlled or limited by the previous condition or specification of hazards. Therefore, if the act done by the assured, although not included in the class of specified hazards, it nevertheless avoids the policy if it increases the risk. 1 Strobart, S. C. Reports 281; 10 Pickering 535; 2 Comstock, N. Y. Reports; 53 Penn. 353.

That the risk was increased in this case by the storing a large quantity of loose dry hay in the building insured, we think can admit of no doubt. If hay pressed in bales be excepted as hazardous for the reason that it is easy to ignite, *a fortiori*, hay in the loose, unbaled state, would be far more so from the rapidity with which incandescence and flame would be developed by ignition. We think the defense is sustained and that the judgment should be affirmed.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

Sauton v. Leverich. Sauton v. Beatty, etc.

No. 3211.—L. A. SAUTON, Tutor, v. W. E. LEVERICH—JOHN DE LACEY, Sheriff. LOUIS A. SAUTON, Tutor, v. WM. J. BEATTY—WM. E. LEVERICH and H. S. LOSEE, Intervenors. (Consolidated.)

A written statement, under oath, of the amount and character of the wife's claims against her husband for moneys received, etc., if recorded in the proper office within the time prescribed by law, is sufficient to preserve the wife's mortgage on the property of her husband as security for the restitution of her paraphernal estate, which he has received.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. M. Ryan*, for plaintiff and appellee. *Wm. A. Seay* and *H. S. Losee*, for defendants and appellants.

WYLY, J. In January, 1845, William J. Beatty and Clara Brown were married in the parish of Rapides; this marriage was dissolved by the death of Mrs. Beatty in the fall of 1847. Her daughter, Judith Beatty, her sole surviving heir, married the plaintiff, L. A. Sauton, and in the year 1865 died, leaving the two minor children represented by the plaintiff as natural tutor as her sole surviving heirs.

In behalf of these minors the plaintiff herein claims one undivided half of the plantation seized by W. E. Leverich, the judgment creditor of William J. Beatty, the sale of which he enjoins, and also claims the proceeds of the other half on the ground that Beatty was indebted to his wife, the grandmother of the minors, in the sum of \$12,500, for paraphernal funds received and appropriated by him during the marriage with the said Mrs. Beatty, and the tacit mortgage securing said indebtedness bears on the property seized and is superior in rank to the mortgage of William E. Leverich, the seizing creditor. The plaintiff alleges that the said plantation was acquired by William J. Beatty during the marriage with his wife, Clara Brown; that at her death one-half thereof belonged to her as partner in community, there being no community debts; that the same was inherited by Mrs. Sauton, from whom the minors derived title by inheritance.

The court gave judgment for plaintiff, perpetuating the injunction, decreeing the minors to be the owners of one undivided half of the plantation and decreeing them to recover from the defendant, William J. Beatty, \$12,500, with five per cent. per annum interest thereon from the thirty-first day of December, 1847, with recognition of mortgage upon the property of the said William J. Beatty, dating, ranking and taking effect from the seventh day of March, 1845.

The defendants and the intervenors have appealed.

It is proved that the property involved in this litigation was acquired by William J. Beatty during the marriage with his wife, Clara Brown; that the minors are her grandchildren, being the issue of the marriage of Judith Beatty with L. A. Sauton and being her sole heirs; and that the said Judith Beatty was the sole surviving heir of the said Mrs. Beatty, who died in the fall of 1847. The title to one

Sauton v. Leverich. Sauton v. Beatty, etc.

undivided half of the plantation seized by W. E. Leverich, the judgment creditor of William J. Beatty, is, therefore, established in the minors, it being the share of their grandmother in the community which existed between her and her husband, William J. Beatty. The claim for \$12,500 paraphernal funds received and appropriated by said Beatty, as alleged, is also satisfactorily established, together with the legal mortgage securing the same; but it is contended that this mortgage was not recorded, as required by law, previous to the first day of January, 1870.

The mortgage not being in the shape of a written act or judgment, M. Ryan caused to be recorded in the parish of Rapides, on the thirtieth day of November, 1869, the following statement, to wit:

“STATE OF LOUISIANA, Parish of Rapides.

“The statement of M. Ryan, being cognizant of the facts herein stated and of the sum received and all other matters pertinent to these presents, shows that Louis A. Sauton, tutor of the minors Louisa Amelia and Clara Maria, the issue of his marriage with Judith Beatty, that they (the minors) did inherit from their mother twelve thousand five hundred dollars, and bearing five per cent. per annum interest from the thirty-first day of December, one thousand eight hundred and forty-seven, and to secure to them the said sum they have a tacit mortgage on a certain plantation in the parish and State aforesaid, containing about one thousand acres, and being the same plantation on which William J. Beatty now resides; they, the said minors, also claim that they derived the said property in the following manner, to wit: William J. Beatty married Clara Brown, their grandmother, in the year 1845, and that immediately after said marriage the said William J. Beatty received twelve thousand five hundred dollars, the paraphernal property of his said wife, Clara Brown; and that the said Beatty did use and convert to his own use and benefit the said twelve thousand five hundred dollars; that the said Clara Brown, the wife of the said William J. Beatty, died in the year 1847; and the said minors further claim that they are entitled to be reimbursed the said sum, with interest from judicial demand, ranking from the date of the reception of said sum, as set forth.

MICHAEL RYAN.

“Sworn and subscribed before me this, the thirtieth, day of November, 1869.

J. H. C. BARLOW, Parish Judge.”

We regard the registry of this written statement, detailing the facts and circumstances, under oath, of the claim on which the legal mortgage of the plaintiff is based, as a substantial compliance with the first and eighth sections of act No. 95 of the acts of 1869, entitled “An act to carry into effect article 123 of the Constitution and to provide for recording all mortgages and privileges.” The mortgage asserted by the plaintiff is not the mortgage of a minor against his tutor, which

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the act referred to requires to be registered according to sections two and eleven of said act; but it is the mortgage accorded by law to secure the claim of a married woman for paraphernal funds received and appropriated by her husband.

The plaintiff claims by inheritance the debt and the mortgage due by William J. Beatty to his wife, Clara Brown, and in this proceeding seeks to recover the same.

We think the certified copy of the statement was properly received to prove the registry, and that the bill of exceptions to the ruling of the court receiving it was not well taken.

We see no error in the judgment.

Judgment affirmed.

Rehearing refused.

No. 2198.—A. G. KNIGHT, Administrator, etc., v. PONTCHARTRAIN RAILROAD COMPANY.

Persons who, while attempting to get on the cars at the depot station after they have been put in motion, were thrown off and severely injured, can not recover the damages therefor from the railroad company, because their own negligence and indiscretion contributed directly to the disaster. In such a case, when it is shown that the cause of the injury is attributable in the first instance directly to the imprudence or fault of the person who has received the injury, damages can not be recovered from the company, even though it be shown that they were in fault.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. W. B. Kountz & Elliott and Cotton & Levy*, for plaintiff and appellee. *Bradford, Lea & Finney*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWE, J. The plaintiff, as administrator and tutor, brought suit, claiming damages alleged to be due in consequence of the carelessness of the defendant's agents in causing the death of George F. Knight and his wife Euphemia, father and mother of the minors.

The answer was a general denial.

The cause was tried before a jury, who rendered a verdict in favor of plaintiff for \$12,000, and from the judgment entered thereon the defendant has appealed.

It appears from the plaintiff's own testimony that on the day the accident occurred, Mr. and Mrs. Knight, with their four children and two servants, started for an excursion to the lake. They were late in arriving at the station, which extends between Girod and Lafayette streets. As they entered the building from up town, at or near the Girod street entrance, the train had already started moving down town, and they hastened to overtake it, Mr. Knight being considerably in advance, and Mrs. Knight following, somewhat out of breath, and

23	464
51	118

23	462
109	49

Knight v. Pontchartrain Railroad Company.

in what one of the witnesses calls "a slow trot." One servant, with the babe, was assisted on to the rear platform of the last passenger car but one, and some if not all of the other children were also helped on. Mr. Knight then sprung on the same platform, and holding out his hand beckoned to his wife. A police officer who was on duty near the Lafayette street end of the station, ran towards the party shouting, "For God's sake, don't you dare to encourage that lady on the cars!" Another police officer ran forward at the same time with the same intent. The warning was either not heard or not heeded. Mrs. Knight, holding her husband's hand, caught her foot probably in her own clothing, and, falling, was swung between the moving car and the stationary platform, and ground to death as the car rolled on. It might have been better for both if the husband had let go his wife's hand as she tripped; but naturally, perhaps, he held on, and was himself thrown down and one of his legs injured at and below the knee. A shout was raised as soon as Mrs. Knight fell, and the train was stopped before it had moved far, probably within forty feet. The train had moved about two hundred feet when Mr. Knight first sprung on the platform of the car, and from forty to sixty feet further when Mrs. Knight attempted to get on. How rapidly the train was moving is not certain, but it is fair to say from four to five miles an hour at least; faster than an ordinary walk. Mr. Knight died a few days after of tetanus, excited by the injury he had sustained.

The stationary platform was on a level with the platform of the car. The distance between the platform and the edge of the car was about eight inches. The distance to the upper step of the car about twenty-two inches.

It may be conjectured from the argument that there were two theories in the minds of the jury which led them to render a verdict for plaintiff:

First—That the police officers were in some way the agents of defendant, and either assisted and encouraged Mrs. Knight to make the rash attempt which resulted so disastrously, or neglected to prevent her; and,

Second—That the stationary platform was, by the neglect of the defendant, constructed in an improper and dangerous manner.

I. The policemen were not employes or agents of the company, and it was in no wise responsible for their acts or omissions. In justice to these officers, we may add that they did not encourage the attempt of the unfortunate lady to get on the car. One of them shouted the words of warning above quoted, and both tried to prevent the accident.

II. The record shows (and indeed it is difficult for any one who has traveled to ignore the fact) that platforms like the one in question are

to be found in all parts of the country, sometimes used for freight alone, sometimes for passengers alone, and sometimes for both. The plaintiff's witnesses do not agree in condemning it as an improper one. It is certain that it was perfectly safe for any one who used it to get on the cars when they were at rest, and it is equally certain that all platforms are unsafe for such use when the cars are in motion. But granting that there was an element of neglect in the use of such a platform, there is a rule of law, too well settled to be disturbed, that is invoked by defendant—the rule *volenti non fit injuria*.

The extent and application of this rule have been discussed at length in this controversy, and it seems that the numerous decisions cited may be distributed into three classes.

First—Where the conduct of plaintiff has as matter of fact contributed to the accident, but such conduct has not been in a legal sense imprudent or negligent. In such case the plaintiff may recover from a defendant in fault. Such was considered the state of facts in *Choppin v. The Carrollton Railroad*, 17 An. 19, as appears from the record, though not from the published report.

Second—Where the conduct of the plaintiff has been imprudent or negligent, but such imprudence or negligence has not contributed to the accident. In such case the plaintiff may recover from a defendant in fault.

Third—Where the conduct of plaintiff has been negligent and has contributed to the disaster. In such case the plaintiff can not recover, even though the defendant be in fault. Such was either the state of facts or the doctrine announced in the following cases: *Fleytas v. Pontchartrain Railroad*, 18 L. 339; *Hubgh v. Carrollton Railroad*, 6 An. 496; *Damont v. The Same*, 9 A. 441; *Hill v. Opelousas Railroad*, 11 An. 292; *Myers v. Percy*, 1 An. 374; *Carlisle v. Holton*, 3 An. 48; *Murphy v. Deamond*, 3 An. 441.

The case at bar is clearly within the last class. Much as we may regret the calamity, and deeply as we may sympathize with the bereaved, we can not shut our eyes to the fact that the conduct of both deceased was exceedingly negligent and directly contributed to the sad result.

This conclusion makes it unnecessary to pass on the other points which have been discussed.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside. It is further ordered that there be judgment in favor of defendant with costs.

Rehearing refused.

Moss v. Howard, Prestons & Barrett and H. D. Barrett.

No. 2204.—ROBERT MOSS *v.* HOWARD, PRESTONS & BARRETT and H. D. BARRETT.

In a suit to recover the difference between the price agreed upon for the sale of a lot of cotton and the price which it actually brought (the first sale having failed of completion), the vendor must show that he complied with every requisite and condition on his part, and that the cause of the failure to complete the first sale was attributable entirely to the vendee, failing in which he can not recover the difference from the first vendee.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J.* *James Harrison* and *D. C. Labatt*, for plaintiff and appellant. *E. Wooldridge*, for defendants and appellees.

TALIAFERRO, J. The plaintiff alleges that he sold to defendants ninety bales of cotton to be paid for in cash upon delivery at thirteen and one-fourth cents per pound; that in compliance with his part of the engagement, he produced the cotton at the time and place stipulated for the delivery, when defendants refused to pay for it according to the contract; that the plaintiff, after making a tender of the cotton to defendants and their refusal to receive and pay for it, caused it to be sold in New Orleans soon afterwards, the price having declined, and received for it \$1055 87 less than he would have realized upon it had the defendants complied with their obligation to receive and pay for it at the price agreed upon. The plaintiff therefore brings this suit to recover that sum, with legal interest from judicial demand.

The answer is a general denial. The defendants aver the original contract with the plaintiff in relation to the cotton was subsequently changed into a new one, by which it was agreed that for ninety bales of cotton, at the price stated, the plaintiff agreed to receive a draft on their house in New Orleans at three days' sight; that a draft for \$5352 86 was given to the plaintiff, drawn payable to his own order as required, and that the plaintiff refused to deliver the cotton, thereby violating the contract on his part. The defendants claimed the resolution of the contract and the restitution of the draft, and aver that the contract is null and void.

Judgment was rendered for the defendants, rejecting the plaintiff's demand, with costs. The plaintiff appealed from the judgment.

From the evidence, we gather that an engagement was entered into between the parties by which the defendants bought the entire crop of the plaintiff, which was supposed would amount to about one hundred bales or upwards, but which turned out to be ninety bales. The cotton was to be brought to Edwards Station, on the railroad, thence to be transported to Vicksburg, weighed and paid for at the price of thirteen and one-fourth cents per pound. The money was to be sent by express from New Orleans to Vicksburg, and the price paid down when the weight of the cotton was ascertained. It seems that H. D. Barrett, one of the firm of Howard, Prestons & Barrett, and the

Moss v. Howard, Prestons & Barrett and H. D. Barrett.

witness, M. Duffie, were at that time in Hinds county, Mississippi, attending to business of the firm, when this contract was entered into between H. D. Barrett and the plaintiff, Moss. Barrett, under date of nineteenth November, 1867, wrote from Edwards Station to Messrs. H. Wright & Co., of Vicksburg, stating the contract as it seems it was originally made, and then adds: "Since then I met him here (meaning Moss), and he said he wanted the matter closed up when the cotton was weighed in Vicksburg. * * * See to the weighing of the cotton, and when you have done this, see what it amounts to at thirteen and one-fourth cents per pound, then give him a draft at three days' sight on our house in New Orleans for the amount." This letter, it appears, was sent to Vicksburg by the plaintiff himself.

The witness, Green, of the house of Wright & Co., says: "When the cotton was brought by Mr. Moss to Vicksburg, I soon discovered that some misunderstanding existed between the parties about the draft on the house offered him in payment of the cotton. Moss refused to let the cotton go forward until the draft was paid. No money was tendered to him. I sent the draft to New Orleans to be collected for account of Mr. Moss, and wrote the facts to Mr. Barrett." To this letter Barrett answered, twenty-first November: "Yours of the twentieth to hand. You ought not to have given Moss the draft, as he withheld the cotton and refused to deliver it. You will please telegraph your house at New Orleans at once not to present the draft for acceptance, but to return the same to you, and you will inclose my letter to Mr. Duffie, who will talk with you about the matter."

The plaintiff shipped the cotton to the house of Summers & Branin, who received it on the twenty-ninth November, 1867, and sold it on the second December following. By directions, however, of the plaintiff, the cotton was first tendered to the defendants under the contract made by them with the plaintiff, and refused.

It is contended on the part of the plaintiff that he at no time agreed to give possession of the cotton to any one until he received the money. This is the substance of the plaintiff's own testimony. But he is not, we think, sustained in this position by the evidence at large. We think it pretty clear that the other party understood the last agreement made about the cotton to mean that upon its weight being ascertained at Vicksburg it was to be delivered to them, when they were to give the draft at three days' sight. The plaintiff indorsed the draft, but he assumed the right under the agreement, as he interprets it, to retain possession of the cotton until assured of its payment.

Mahone, the only witness who it appears was present when the contract was entered into, says: "When the trade was first spoken of, Mr. Barrett agreed to have the money expressed either to Edwards' Depot or to Vicksburg, but afterwards a draft was proposed and ac-

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cepted." * * * "The cotton was to be weighed at Vicksburg and the settlement to be made by them, and Barrett was to give him a draft on Howard, Prestons & Barrett, New Orleans, for the money." *

* * "Defendants were to have nossession of the cotton without delay, that it might be sent forward."

We must conclude that such was the purport of the agreement between the parties. We find nothing that, in our opinion, justifies the belief that the plaintiff was to retain possession of the cotton until the draft was paid. The plaintiff having failed to comply with his part of the agreement, the defendants were absolved from the obligation to pay the price, and the plaintiff's action fails.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

NO. 3230.—CARL KOHN v. T. G. DAVIDSON.¹

A motion to dismiss the appeal for informalities in the appeal bond, comes too late if not made within three judicial days from the filing of the transcript.

A document or paper shown to be partly written by the maker of a promissory note, in which a proposition is made to compromise the note by selling and making title to a tract of land in payment thereof, must be held as renouncing prescription by the maker of the note.

APPEAL from the Sixth Judicial District Court, parish of Livingston.
Ellis, J. Clarke, Bayne & Renshaw, for plaintiff and appellant.
T. & J. Ellis, for defendant and appellee.

HOWE, J. The motion to dismiss in this case for informalities in the appeal bond comes too late, not having been filed within the three days prescribed by law.

Plaintiff sues upon a promissory note for \$3000, due October 8, 1861. Citation was served in 1870. The plaintiff, on the trial to rebut the plea of prescription, offered a document, "A," which commenced with a copy in full of the note, and continued as follows:

"MR. CARL KOHN—The original of the above note has been presented to me for payment by your attorney at law, George H. Penn. *I acknowledge the debt to be due and owing, and will pay; at the same time I am entitled to a credit of \$1500 on the note, which I paid to Mr. John Slidell while he held it, and for which he gave me a receipt, but which receipt was destroyed when my dwelling was burned down during the war. I am anxious to pay this debt, and am now willing to sell and convey to you a certain parcel of land lying and being situate in the parish of Livingston and State of Louisiana, described as follows: * * * in full satisfaction of the same. If you accept this proposition, inform me, and I am ready to pass you a notarial, guaranteed and unencumbered title to said land, being three hundred*

23	467
44	800
23	467
48	800
23	467
104	649
23	467
113	773

Kohn v. Davidson.

and twenty acres best cotton land on the Amite river, known as the Indian tract, on account of the richness of the soil in this neighborhood. Full crops of cotton have been made this year, being three miles from the late residence of T. G. DAVIDSON.

October 24, 1866."

The defendant, in turn, testified to this paper, as follows:

"Mr. Penn, immediately after the surrender, at the first term of court here, presented me a petition with the original note now sued on, offering to give me one, two and three years to pay it, or any time I wanted, which I refused. I then offered, by way of compromise, to give three hundred and twenty acres of land on the Amite river to pay the debt. He drew up document A, and asked me to sign it. I refused to sign as drawn up, but made a memorandum at the bottom, *which I signed*, explaining what I was willing to do. The only part of document A executed between me and Mr. Penn was the memorandum describing the land, from the seventh line from the bottom down. In signing the lower portion of the document, it was not my intention to sign or agree to anything except what I wrote there myself. It was only intended as a memorandum to Mr. Penn, to show that which I was willing to do. Made no recognition or acknowledgment of the debt whatever only by the way of compromise, nor no promise to pay in any other way."

The original document is attached to the record. It is written quite continuously (except a blank for description of land) on one side of a half sheet of cap paper. The portion admitted to be written and signed by defendant begins with the words, "being three hundred and twenty acres best cotton land," etc, near the end of the document. It is in direct and close continuation of the sentence lastly written by Mr. Penn. It does not commence with a capital letter, nor on a new line. It refers grammatically to the previous portion of the sentence, and logically to all that precedes it in the paper, which it explains and completes. The defendant admits that he signed it, and we must conclude that he thus assented to the recitals of the entire document.

The bills of exceptions do not require consideration.

Prescription being the only defense, and being clearly renounced, it is ordered that the judgment appealed from be reversed, and that the plaintiff, Carl Kohn, have judgment against the defendant, T. G. Davidson, for the sum of \$3000, with interest at eight per cent. per annum from October 5, 1860, and costs.

ON REHEARING.

Howe, J. Through inadvertence we passed upon the merits of this case, which had not been passed on in the court below. Our judg-

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ment should be limited to overruling the plea of prescription, in regard to which, and the facts by which it is shown that prescription had been renounced, our opinion is unchanged.

It is therefore ordered (our former decree being set aside) that the judgment of the lower court be avoided and reversed; that the plea of prescription filed by defendant be overruled, and that this cause be remanded to the lower court to be proceeded with according to law; the defendant to pay costs of appeal.

No. 2207.—DAVID WALLACE et als. v. R. D. URQUHART et al.

Dry goods, such as calico, lawn, poplin, white cotton hose, and the like, sold to laborers on a plantation, give no privilege to the vendor on the crop of cotton of that year grown on the place. A privilege is only given on the growing crop of the year for such necessary supplies as are used in producing it.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. E. T. Fellows* and *E. W. Huntington*, for plaintiffs and appellants. *Hays & New*, for defendants and appellees.

WILLY, J. The plaintiffs, claiming the privilege of a furnisher of supplies, sequestered fifty-four bales of cotton consigned to D. R. Carroll & Co. by John R. Williams.

D. R. Carroll & Co. intervened, and, denying the privilege asserted by the plaintiffs, alleged that they received said cotton as the commission merchants of said Williams, to whom they had advanced supplies to the amount of \$6110 72 to produce it, and that they have a privilege thereon superior to the plaintiffs.

The court gave judgment setting aside the sequestration and dismissing the demand of the plaintiffs, and restoring the cotton to the intervenors, D. R. Carroll & Co., and recognizing the privilege of the latter thereon for the amount claimed by them. The plaintiffs have appealed.

The contest is between the plaintiffs and the intervenors.

It appears that in 1866 John R. Williams purchased from the plaintiffs a lot of dry goods for the store kept by him on the "Willow Glen Plantation," in the parish of Rapides, which plantation he was cultivating that year, and that the goods were purchased by him to be sold to the laborers on the place. The debt contracted for the goods amounted to \$3819 40, and the only evidence we find in reference to their destination is the statement of Williams, who testified in the case. He says: "The goods mentioned in the account were sold to the negroes by me on the Willow Glen Plantation; some were used in my family, and some left on hand not sold. I had a store on the plantation, from which these goods were sold."

What part of the goods were sold to the laborers, what part was left

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on hand, and what part was consumed by the family of Williams, we are not informed by the record. But whether the merchandise was furnished to the laborers or not, an examination of the invoice thereof satisfies us that the plaintiffs are not entitled to the privilege which they assert. The items charged in the account were not necessary supplies. The following are specimens: "Apron checks, gingham, Eng. long cloth, furniture, English barege, lawn, poplin, plaid organdie, jaconets, canton flannel, jeans and satinet pants, white cotton hose, balmorals, pins, wallets, necklaces, buckles, needles, fancy ties, vests, green barege, Victoria lawn, swiss, brilliantine, mohair orientals, pearl buttons, plaid shawls," etc. These articles were not necessary to the subsistence of the plantation, and the plaintiffs furnishing the same are not entitled to a privilege on the cotton sequestered by them.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

Rehearing refused

No. 2219.—BRUTUS J. CLAY, Administrator, v. LEROY C. MARTIN.

This is a seizure of the cotton made on the plantation for the payment of rent stipulated in the lease. The lessee insists that there was an overflow of the plantation during that year and that there was a verbal agreement of subsequent date to that of the lease that, in case of an overflow, the lessee was not to pay any rent. The plaintiff showed the lease and also a settlement at or near the end of the year of all matters between the parties, except the payment of rent, in which nothing was said about the lessee's not being required to pay rent in case of an overflow. The overflow was shown to be only partial and the crop not a total loss. On the other hand, it was shown by the testimony of the lessee, which was corroborated by two other witnesses, that, in case of an overflow, he was not to pay rent.

Held—That these facts preponderated in favor of the lessor, who was claiming under the written lease; that the settlement which was made and reduced to writing between the parties, which was corroborated by oral testimony, when taken in connection with the written lease, was stronger than the verbal agreement which the lessee contended was made that he was not to pay rent in case of an overflow.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. John H. Kennard*, for plaintiff and appellee. *A. Robert*, curator *ad hoc*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues on a contract of lease entered into between C. J. Field (whose estate is administered by plaintiff) and the defendant and one Childress, by which Field leased a plantation in Bolivar county, Mississippi, to Martin and Childress for cultivation during the year 1867, for the consideration of \$4000. The contract is a written one. The crop grown on the leased premises seems to have been a small one, in consequence of the high water of that year. It was shipped to New Orleans and sold by the house of Morrison, Buck & Co., in whose hands the plaintiff attached the proceeds, amounting to a little over \$1200, claiming the lessor's privilege. A curator *ad hoc* was appointed to represent Martin, an absentee. The curator *ad hoc* answered, denying any indebtedness to the plaintiff,

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and averred that after the execution of the written lease, Field, the lessor, by a contract between himself and Childress, took the place of Childress in the original agreement, and by this new arrangement the plantation was cultivated by Field and the defendant, Martin, who, in assenting to the second contract, stipulated with Field that the defendant should not be bound to pay any rent if an overflow of the plantation should occur. This agreement, alleged by the defendant to have been made, was not reduced to writing. The defense is, therefore, that an overflow of the plantation having occurred in 1867, the defendant was exonerated from paying rent. The defendant set up a reconventional demand for \$4050 for cotton alleged to have belonged to the defendant and which Field received and sold and failed to account to him.

The plaintiff pleaded prescription against the reconventional demand.

Judgment was rendered in the court below rejecting the defendant's reconventional demand and awarding judgment in favor of the plaintiff for \$2000, with six per cent. interest from first January, 1868, with privilege upon the proceeds of the cotton attached.

The defendant has appealed.

The testimony conflicts materially. Martin, for himself, swears that the condition in regard to overflow was stipulated between himself and Field. A witness in his behalf testifies that she heard Field say that Martin was to pay no rent if the land should be overflowed. This statement is also made by the lady's husband. But Martin's testimony, in his own behalf, we regard as greatly neutralized by the plaintiff's testimony. The latter shows that Martin signed a written instrument importing a settlement by him and the administrator of Field on the seventeenth January, 1868, which expresses the following: "We have this day settled the partnership between Leroy C. Martin, T. J. Childress and C. J. Field in cultivating the 'Content Plantation' for the year 1867, except the rent for the plantation and the amount due Coffee for supplies, for which each one agrees to pay one equal half." In connection with this instrument in evidence, Myers, a witness, says he was present at the settlement by request of the defendant. He states that Martin set up the claim for reduction of the rent on account of overflow, and also a claim for cotton, but that these claims were rejected by the plaintiff. He says that the old lease, the one in writing, was the basis of their settlement and constantly referred to. The witness Converse says: "The agreement to purchase Childress' interest by Field was verbal. I was present; made the calculations for Colonel Field. Nothing was said about overflow or worms. This settlement occupied two days. Martin was present the first day; at the time of the close of the settlement he was not present. He was privy and present at the time of the buying out of

the lease by Field; made no stipulations about overflow or worms; nothing was said on that subject at the time, that I heard." This witness says that at the settlement between the administrator and Martin the latter "claimed that he gave Colonel Field, during the war, permission to give up some seed cotton and bale it and sell it. Mr. Clay refused to allow the claim. The signing of the settlement B was after this conversation occurred." The statement of two witnesses before referred to, husband and wife, sustaining Martin's in regard to the condition respecting overflow, is contradicted by the testimony of Converse. This witness lived in the house with Field, and we infer was his physician. Field died on the eighteenth of July, 1867. This verbal agreement between Field and Martin, upon the former's taking the place of Childress under the written lease, occurred in May previous. Mrs. Buckner, one of the witnesses, says she heard Field, at her husband's residence, speak of the agreement not to exact rent if an overflow should occur. Her husband also names his house as the place where he heard this statement. Converse says that after the verbal agreement in relation to the new contract, Field was never at Buckner's, and he mentions facts with much circumstantiality upon which he bases this declaration and speaks in positive terms. Holloway, who was the agent of the administrator and who dealt with the parties in relation to the lease, says in the course of his testimony: "I know personally there is no dispute as to Martin's indebtedness. I know that Martin knows of this seizure. I have seen Martin since the seizure herein. He admitted his indebtedness and offered to compromise."

After a review of all the evidence we incline to think with the judge *a quo* that there is a preponderance in the evidence on the side of the plaintiff.

It appears that there was not a total loss of the crop on the "Content Plantation" in 1867. The witness, Holloway, says there were sixty-one bales raised.

In regard to the reconventional demand we think it too vague and indefinite to be admitted. No time is fixed when the cotton alleged to have been furnished by Martin to Field was received. It is said to have been "during the war." Martin himself says nothing about it in his own testimony. A witness states that in 1866 he heard Field say he owed and had to settle with defendant (Martin) for cotton received. This evidence, if admissible, is too indefinite to establish the claim asserted.

We do not think, as contended for by plaintiff, that he is entitled to a personal judgment.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Daniel & J. D. Edwards v. Harrison et als.

No. 2100.—DANIEL & J. D. EDWARDS v. W. C. HARRISON et als.

If prescription has not been pleaded it will not be noticed by the court on suggestion in argument.

If the appeal was taken for delay only, damages will be allowed the appellee as for frivolous appeal.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Maurice Griot*, for plaintiffs and appellees. *Randolph, Singleton & Browne*, for defendants and appellants.

HOWELL, J. Defendants, who are the captain and owners of a steamboat, have appealed from a judgment with privilege for the amount of two notes, given for work and materials furnished and done on the said steamboat. They suggest in their brief that there is error in granting a privilege as there is no evidence to show that the claim originated within the time fixed for the expiration of such privilege by article 3237, Civil Code, or the act of 1858, p. 111. To this the successful reply is that prescription is not pleaded, and the court can not supply it. C. C. 3463, 3464. The defense is a simple general denial. Interrogatories were propounded to defendants to prove the debt and its nature, which were answered affirmatively. The appeal was taken in January, 1869, and its purpose seems to have been delay. The prayer for damages must be allowed.

It is therefore ordered that the judgment appealed from be affirmed, with eighty dollars damages and costs of appeal.

No. 1025.—THOMAS SCHORR v. P. W. WOODLIEF.

A protest of a foreign bill of exchange made by a foreign notary is admissible in the courts of this State to establish presentment, demand and nonpayment, without proof of the signature and capacity of the notary being made. But the act of the General Assembly of this State, which makes the certificate of notice by the notary competent evidence of such notice, only applies to notaries of this State. Therefore a certificate of notice by a foreign notary, attached to the protest of a foreign bill of exchange, is not sufficient proof in the courts of this State that the proper notice was given.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. John Henderson, Jr.*, for plaintiff and appellee. *Thomas J. Cooley*, for defendant and appellant.

HOWE, J. Action on foreign bill of exchange drawn by defendant at Jackson, Miss., on a firm in Mobile, Ala., protested for nonpayment August 28, 1862. Defense, a general denial. Judgment for plaintiff and appeal by defendant.

The only evidence of the notice of protest was furnished by the introduction, without proof of signature or official capacity, of an official copy of the act of protest by the notary in Mobile, which contains a clause stating that notices of protest for P. W. Woodlief were sent by mail directed to him at Jackson, Miss. The defendant, by objection

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and exception, presents the question as to how far this paper establishes the liability of the defendant. We understand the rule to be that protests of foreign bills by foreign notaries are received in aid of commerce to establish the facts of presentment, demand and nonpayment, and this without proof of their signatures and official capacities. 15 La. 555. But beyond this the rule has not been extended, either by decision, or, in this State, by statute. 9 An. 235, *Schneider v. Cochrane*. And, therefore, in this case, even if the protest of the draft was proved, the service of notice was not.

It is therefore ordered that the judgment appealed from be reversed, and the action of plaintiff dismissed, as in case of nonsuit, and at his costs.

No. 2206.—SPALDING & ROGERS v. JOHN P. WALDEN et als.

In a forced sale of an absentee's property under an attachment process, in 1862, while Confederate notes were a circulating medium, the absentee will be presumed not to have consented to the sale of his property in such unlawful currency; and in case it has been subsequently determined that the absentee should receive the price of the sale, the sheriff who made the sale and received the price, can not be permitted to set up in defense to its payment that the sale was made for and the price received was in Confederate notes, and that he, the sheriff, could not be compelled to pay any other than such currency as he had received. In such a case the presumption is the other way; that is, that the absentee did not sanction or approve the sale of his property for unlawful currency.

A suit to recover from the sheriff money made by him in a judicial proceeding, is not an action against the sheriff for misfeasance or nonfeasance in office, and is not therefore prescribed by two years.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Richard Shackelford*, for plaintiffs and appellees. *Fellows & Mills*, for defendants and appellants.

WYLY, J. In September, 1861, David Bidwell, claiming to be a creditor of the plaintiffs, who were citizens, the one of New York and the other of Pennsylvania, sued out an attachment against them in the Sixth District Court of New Orleans, under which was seized their steamboat called the Banjo, which was sold by the defendant, Walden, then sheriff, under a preliminary order of court, on the twenty-fourth day of February, 1862, for \$2000 cash.

After the occupation of the city by the United States forces, in 1862, the attachment was released, and the court ordered the proceeds of the sale of the steamboat Banjo to be paid over by the said John P. Walden to Spalding & Rogers, the defendants in the said attachment suit. Having failed to do so, the present suit was instituted by the plaintiffs against him and the sureties on his bond as sheriff.

The defense urged in the brief is that the currency at the time of the sale was Confederate treasury notes; that such currency could only have been expected at the time of the sale, and that the sheriff

was bound to hold the same until the parties agreed to the distribution. In support of this position, the case of Harvey, syndic, v. Walden et als., lately decided, is relied on. In the case cited, the plaintiff obtained from the court an order of sale, and placed it in the hands of the sheriff in 1862, and under the writ the sheriff sold the property for Confederate treasury notes, which he deposited in bank, and the proceeds of the sale were not called for by the plaintiff till August, 1863, and it was proved that the sheriff was ready and willing at all times to pay over the currency received by him. In that case the court held that the plaintiff, residing in the city of New Orleans, must be presumed to have known that there was no other currency in circulation except Confederate money at the time he placed the writ in the hands of the sheriff, and by placing the writ in the hands of the latter to sell the property of his debtor, he authorized him to receive Confederate treasury notes for the price.

The theory of that decision was that by requiring the sale at the time he knew it could only be effected for Confederate money, the plaintiff in execution authorized the receipt of that unlawful currency by the sheriff, and should not be permitted to take advantage of the latter in a proceeding sanctioned by himself.

In the case at bar, however, there is entirely a different state of facts.

The defendants in the attachment suit, the plaintiffs in this suit, can not be presumed to have authorized the sale, or in any manner to have sanctioned the proceeding, being at the time absent from the city, and residing, one in New York and the other in Pennsylvania.

It would be unreasonable to presume that these citizens of loyal States, whose property was attached in rebel lines, authorized the sale thereof under a preliminary order of court for Confederate treasury notes, or that they sanctioned the receipt of said notes by the sheriff for the sale of their property.

We think the judgment of the court below in favor of the plaintiffs is correct.

Judgment affirmed

ON APPLICATION FOR REHEARING.

WYLY, J. It is unnecessary to grant a rehearing on the question of prescription, which escaped the attention of the court, because there is nothing in it to change our conclusions.

The case, as made in the pleadings, is not an action for misfeasance or nonfeasance by the sheriff, to which the prescription of two years is applicable under the act of 1855, but it is for the recovery of money which the answer says was received by the sheriff and put in bank, and which funds he was unable to withdraw to liquidate said claim by military orders, etc.

The Confederate money defense was not pleaded; it is only set up in the brief, and all that the record shows in relation to it is the evidence of one witness, that at the period of the sale that illegal currency was in circulation. As it was insisted in the brief that the case is covered by the rule announced in *Harvey, syndic, v. Walden et als.*, and as indeed the whole defense was placed upon that decision, we assumed for argument the fact that Confederate money was received, as asserted in the brief, and proceeded to show that the theory of that decision is not applicable to this case, because the facts are different.

While a judgment creditor, requiring the sale of his debtor's property at a time he knows it can not be effected by the sheriff except for Confederate money, is presumed to sanction the receipt thereof by him, an absent defendant, whose property has been attached and sold under a preliminary order of court, as in this case, is not presumed to authorize the sale, and parties residing in loyal States are not presumed to sanction the sale of their property in rebel lines for Confederate treasury notes. In using this argument, we did not decide the character of the action. That must be determined by the pleadings. And we repeat there is nothing in the pleadings showing that this suit is for a misfeasance or nonfeasance, or for an offense or quasi offense committed by the sheriff, in bar of which the prescription of two years is applicable. Revised Statutes of 1870, section 2816.

The application for rehearing is therefore refused.

No. 2268.—E. W. BURBANK v. I. BLOOM.

Where the evidence in the record in a suit for damages for the violation of a commutative contract makes it clear that the defendant is in fault and liable, the judgment of the court below awarding the damages will be affirmed on appeal.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Fellows & Mills*, for plaintiff and appellee. *E. W. Huntington and Clarke, Bayne & Renshaw*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment condemning him to pay the amount of damages claimed by the plaintiff for failing to deliver the twenty-five barrels of alcohol and the forty barrels of whisky which the defendant sold to the plaintiff on the tenth day of December, 1864, "to arrive," and to be delivered, as the plaintiff alleges, in fifteen days.

From the evidence we are satisfied that the judgment appealed from is correct, and the defendant should pay the damages occasioned by the unjustifiable violation of his contract.

For the reasons assigned in the written opinion of the learned judge *a quo*, it is ordered that his judgment be affirmed, with costs.

 Levy & Dieter v. The Pontchartrain Railroad Company.

No. 1004.—LEVY & DIETER v. THE PONTCHARTRAIN RAILROAD COMPANY.

If a railroad company undertakes the transportation of cotton, with the special exception of liability on account of loss by fire, and the cotton is destroyed by fire while on the route, and it be shown that the loss was not attributable to the fault of the company, then and in that case the owner can not recover the damages from the company which the loss of the cotton has caused him.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Bradford, Lea & Finney*, for plaintiffs and appellants. *W. H. Hant*, for defendant and appellee.

LUDELING, C. J. The plaintiffs sue the defendant for the sum of \$5250, and interest from eleventh November, 1865, the alleged value of thirty-five bales of cotton destroyed by fire while being transported by defendant from Lake Pontchartrain to New Orleans.

The bills of lading show that the parties expressly excepted the carriers from liability on account of loss by fire, and the evidence in the record proves that the loss was not attributable to the fault of the defendant. 7 An. 235, *Oakey & Hawkins v. Gordon*, and *New Orleans Mutual Insurance Company v. Jackson Railroad Company*, 20 An. 303.

It is therefore ordered that the judgment of the lower court be affirmed, with costs of appeal.

No. 2213 —SAMUEL L. JAMES v. PIKE, LAPEYRE & BROTHER.

23b	477
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In a contract of pledge the pledgee has the right to dispose of the thing pledged in payment of his obligation at maturity, whether the thing pledged belongs to the debtor or to a third party, who gave it as surety for the debtor. The contract of pledge is different from that of surety. In the former case a material thing is given in pledge as security for the debt, while in the latter case a person is given as security that the debt will be paid, and in the latter case if the creditor give to the principal debtor an extension of time without giving notice to the surety, the surety thereby becomes discharged, which is not the case where a thing has been given as a pledge that the debt should be paid.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. H. McCaleb and Gibson & Austin*, for plaintiff and appellant. *Hays & New*, for defendants and appellees.

WYLY, J. The plaintiff has appealed from a judgment dismissing his injunction and rejecting his demand for the recovery of thirty-one shares of stock of the St. Charles street Railroad Company, which were pledged by him to the defendants, Pike, Lapeyre & Brother, to secure a loan to Walton & Deslonde on the note of the latter for \$1500, due and payable the first and fourth of June, 1868.

The ground taken by the plaintiff is, that having pledged his stock to secure a loan to others, he is, in contemplation of law, a surety, and the defendants having granted the principal obligors an extension of time for the payment of the debt without his consent, thereby released his stock from the pledge.

We are unable to agree with the counsel of the plaintiff, either as to the facts or the law of this case. We are not satisfied from the evidence that there was an extension of the time for the maturity of the note. There was, however, an indulgence of a few days granted on the day of the maturity of the note to Walton & Deslonde, on the representation of Walton that James, the pledgee, was absent from the city, and in consequence thereof he was unable to pay the note, but that he would do so as soon as Mr. James returned, which would be in a few days. We regard the delay in enforcing the payment of the note as a mere indulgence; it was not an extension contracted for a valid consideration between the payees and the makers without the consent of the surety, if James, the pawnee, be considered such. But we do not concede that the contract of pledge can be extinguished in the manner contended for by the plaintiff.

The reasoning in the learned brief filed by the counsel of the plaintiff, showing the analogy between the obligation of suretyship and the contract of pledge, and the reason why the latter should become extinguished, as the former is discharged, by the prolongation of the terms granted the principal debtor without the consent of the surety, is ingenious, but not sound.

The contract of suretyship is where a person is given to secure a debt. The contract of pledge is where a thing is given to secure the debt. The two contracts have separate and distinct features. The right of the plaintiff to pledge his certificates of stock to secure the debt of Walton & Deslonde and the validity of the contract did not result from the law of suretyship, but from the law of pledge, C. C. 3100, 3108, and the rights of the pledgees in this case are the same whether the stock pledged belonged to the plaintiff or belonged to their debtors, Walton & Deslonde. The law authorizing the contract of pledge has not provided different modes of extinguishing it according as it may have been made for one's own debt or as security for the debt of another. The right of Pike, Lapeyre & Brother to the thing pawned in this case was just as valid, just as absolute and enduring as if they had received it from their debtors, Walton & Deslonde, instead of receiving it from the plaintiff. Protest and prompt notice of dishonor were in no manner necessary to protect them as pawnees; the rights of the parties were fixed by the contract of pledge and the law under which it was made. C. C. 3108, 3112, 3122. If protest and notice of protest were not necessary to preserve the pawn if it had been given to Pike, Lapeyre & Brother by their debtors, Walton & Deslonde, it was not necessary to preserve it when given to them by the plaintiff to secure the debt of said Walton & Deslonde. Where the law has not discriminated, we can not. Where the law of suretyship, viz., C. C. 3032, declaring "the prolongation of the terms granted to

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the principal debtor without the consent of the surety, operates the discharge of the latter," has not been made applicable to the contract of pledge, and made a mode of extinguishing the obligation resulting therefrom, we ought not to apply it or declare it a legal mode of discharging obligations of that character.

The plaintiff also contends that as the stock was not transferred on the books of the St. Charles street Railroad Company to Pike, Lapeyre & Brother, the pawn was not legal; that the transfer and delivery of the certificates of stock to them, together with the written act of pledge, were not sufficient. Here we think the counsel of the plaintiff is again in error. We think the contract in this case is provided for by the express terms of the act of the twelfth of February, 1852, viz.: "Whenever a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations, or claims upon other persons, he shall deliver to the creditor the notes, bills of exchange, certificates of stock, or other evidences of the claims or rights to be pawned, and such pawn so made without further formalities, shall be valid, as well against third persons as against the pledgers thereof, if made in good faith."

We think the judgment of the court below is correct

Judgment affirmed.

Rehearing refused.

NO 1949.—WALDO J. ELMORE v. KEARNY, BLOIS & CO.

Plaintiff, a merchant in New York, sold a lot of goods to Kearny, Blois & Co. of New Orleans. The evidence is that the goods were shipped on board the steamer Texana, without insurance; that the Texana was captured by a rebel cruiser on the high seas and the cargo became a total loss. Plaintiff brings suit against Kearny, Blois & Co. for the amount of his bill so shipped, who resist the payment on the ground that, not having received the goods, they were not liable.

Held—That the purchasers having ordered the goods, and given special instruction not to insure, they must be considered as having taken the risk of the goods upon themselves and they were therefore liable, notwithstanding they had not been received.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Fellows & Mills*, for plaintiff and appellee. *Geo. L. Bright*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, who is a merchant of New York, sued the defendants, who are commercial partners, trading and doing business in New Orleans, for the sum of \$557, the amount of a bill of goods shipped by the plaintiff to the defendants in the month of April, 1863. The answer is a general denial. The plaintiff had judgment in the court below, and the defendants appealed.

The evidence shows that the parties had previously dealt with each other, the defendants ordering goods at different times previous to

ordering the bill for which this suit is brought. The plaintiff filled the bills and was in the habit of forwarding to New Orleans at each shipment the bill of lading and draft on defendants for the amount of the bill of goods. The last shipment, but one, was made on the fifteenth of April, 1863, and was composed of the goods for which defendants refuse to pay. This shipment was made on board a vessel called the "Texana," which was captured and destroyed by a rebel cruiser. The goods were consequently never received. One of the plaintiff's witnesses in his testimony specifies three different shipments made by plaintiff to defendants, two before the one made on fifteenth April, 1863, and one afterwards. All the shipments seem to have been made in the same manner and upon the same basis. This witness says, in regard to insurance, that nothing was ever said by the defendants in their business correspondence about it except on one occasion in a letter received from the defendants before the shipment of the goods that were lost, and they said in that letter "don't insure." An effort is made on the part of the defense to show a discrepancy between the articles shipped and those ordered. The letter ordering the articles specifies only one article of a particular kind—a large kind of lamps, describing them—which if not to be had others were to be sent. We find in the bill quite a variety of this kind of merchandise, such as lamps, lanterns, etc., of various names and kinds. The defendants further contend that if the merchandise was at the risk of the defendants at the time of the shipment the subsequent orders of the plaintiff wholly changed the obligation of the defendants. This change of relation between the parties, set up in defense, is that as soon as the shipment was made plaintiff transferred to a banker of New York the bill of lading and gave him a draft on the defendants with these instructions: "No protest; if paid please remit; if not accepted please return all the papers to me. If they refuse acceptance on account of non-arrival of the goods shipped, please take acceptance on the arrival thereof." Upon this, the defendants say that the arrival of the goods was a condition precedent to the payment for them. We think differently. When, by ordering the shipment, and especially after instructions to the defendants before the shipment was made not to insure, they plainly took upon themselves the risk of the goods. We can not believe the plaintiff assumed the risk and entered into a stipulation by which he might be injured and the defendants alone benefited. One of the firm of Kearny, Blois & Co. in his testimony says: "The goods were ordered by us." We see no force in the defense, and think the decree of the lower court was correctly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

W. & H. Stackhouse v. Zunts.

No. 2020.—W. & H. STACKHOUSE v. JAMES E. ZUNTS.

This is an injunction suit to prevent the enforcement of a mortgage on a plantation sold by defendant to plaintiff, by written notarial act of sale, on the ground that the consideration of the notes given by plaintiff to defendant was for the price of the sale of persons (slaves). On trial the plaintiff offered parol evidence to show that the consideration of the notes on which the order of seizure and sale of the land had issued was the price of the sale of persons (slaves). The defendant likewise offered parol evidence to show that the consideration of the notes sued upon was not the price of the sale of persons (slaves), but were given for a part of the price of the sale of the land (plantation), which was objected to by the plaintiff on the ground that parol evidence was inadmissible to explain, contradict, vary or modify a valid written act of sale.

Held—That, although the rule is well established that parol evidence is not admissible to explain, contradict, vary or modify a valid written act of sale, yet, in the present case, there being no issue before the court in relation to the contract evidenced by the written notarial act of sale, and the object of the defendant in offering the testimony was not in aid or explanation of the written instrument, but was offered to controvert the same class or kind of testimony which had been offered by the plaintiff, it should, therefore, have been admitted for that purpose.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. C. Roselius and Alfred Philips*, for plaintiffs and appellants. *Randall Hunt*, for defendant and appellee.

REPORTER—The first opinion rendered in this case being overruled by this opinion, rendered on rehearing, its publication is omitted in these reports.

ON REHEARING.

LUDELING, C. J. On the trial of this case, the plaintiffs having offered parol evidence to establish that the consideration of the notes sued on was the sale of persons, the defendant likewise offered witnesses to prove that the sale of slaves was not the consideration, but that these notes formed a part of the price of a plantation, in accordance with an agreement made a considerable time before the sale of the Bellechasse plantation by the heirs of Packwood and defendant and plaintiffs. This was objected to on the ground that it was an attempt to contradict the notarial act of sale by the heirs of Packwood and Zunts to the plaintiffs. In our former opinion we held that the objection was well taken; but on more mature consideration we are not satisfied with that ruling. The subject matter of that notarial act is not under consideration in this suit. The object of this suit is not to enforce any right growing out of the contract evidenced by that notarial act, and, therefore, the object of the testimony offered is not to aid in the interpretation of the act. It is a general rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument," and the reason of the rule is to prevent the substitution of a new and different contract for the one which was really agreed upon and reduced to writing.

It is evident that the reason of the rule does not apply in the case in hand. There is no contest in relation to the contract, evidenced by

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the notarial act. The notarial act itself was only introduced to prove the declaration of Zunts relative to the price stated in that act of sale. All considerations of evidence must be pursued with reference to the subject matter to which it is to be applied, and to weigh the competency or sufficiency of evidence, in any given case, it is requisite to discern with accuracy the nature of the proposition it is offered to establish. Evans' Pothier Appendix, No. 16, rec. 11, p. 216.

We are of opinion that the declaration in the notarial act by Zunts and the Packwood heirs that the price was \$100,000 does not estop Zunts from showing that the notes sued on formed a part of the price of the plantation, when it is attempted to prove that the consideration of the notes was slaves. Otherwise truth might be suppressed.

The evidence in the record is conflicting. We believe that the ends of justice will be better subserved by remanding the case for a new trial.

It is therefore ordered and adjudged that our former decree be set aside; that the judgment of the district court be annulled; that this case be remanded to the court *a qua* to be tried *de novo*; and that the appellee pay costs of appeal.

No. 1466.—MRS. DE ST. ROMES v. D. B. MACARTY

A purchaser of real property at forced sale can not be required to pay the back taxes which have accrued and are standing against it of date prior to the sale. The sheriff has not the right, therefore, to pay such taxes out of the purchase price, and thereby reduce the amount to be credited on the *feri facias* to that extent.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J.* *Whitaker & Rice*, for plaintiff and appellant. *Hornor & Benedict*, for defendant and appellee.

HOWE, J. This controversy arose from the payment of certain taxes for the plaintiff which she insists were not due by her

An examination of the record shows that she did not personally owe the taxes for the years 1852 to 1855, inclusive, which accrued prior to her purchase of the property in 1856. Upon the forced sale of the property by defendant, the sheriff had, therefore, no right to pay these taxes for the plaintiff, and decrease her credit on the writ of *feri facias* by their amount. The error amounts to \$159 33.

It is therefore ordered that the judgment appealed from be reversed, and that the defendant herein be enjoined and restrained from collecting any sum upon said *feri facias*, or the judgment on which it was issued, beyond the sum of \$1288 34, being balance legally due after sale of January 27, 1865, with interest according to the terms of said judgment, and that the defendant pay costs.

Rehearing refused.

Mr. Justice Howell recessed

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No. 2249.—JOSEPH HERNANDEZ v. A. B. JAMES et al.

23	483
48	907
23	483
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A judgment rendered out of term time, on a rule taken against a surety on an appeal bond, is null and void, although it be rendered in open court and signed by the judge while on the bench.

Under article 303 of the Code of Practice, an injunction will lie to restrain the enforcement of a judgment that is null and void because it was rendered in vacation or out of term time, and the injunction will continue pending the appeal from such judgment.

As a general rule, an injunction will lie in all cases where the act complained of, if committed, would give rise to an action of damages.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiff and appellant. *P. H. Morgan*, for defendant and appellee.

LUDELING, C. J. A. B. James having obtained a judgment against the testamentary executor of Alex. Gordon et al., the executor took a suspensive appeal to the Supreme Court, and gave bond according to law, with Joseph Hernandez as security. The judgment on appeal was affirmed, property of defendant was seized and sold, and the execution was returned unsatisfied.

A rule was then taken on the surety, Hernandez, to show cause why judgment should not be rendered against him for the remainder of the judgment against the executor of Alex. Gordon. The rule was made returnable on the first of October, 1868.

Hernandez excepted to the proceedings on the ground that the court was in vacation, and could not legally entertain and render judgment on the rule at that time. The exception was overruled, and judgment was rendered against Hernandez for \$10,313 03.

Execution having been issued under this judgment, Hernandez obtained an injunction to prevent the sale of his property under the writ, on the ground that the judgment, having been rendered in vacation, was null and void. There was judgment dissolving the injunction, and the plaintiff has appealed.

The defendant contends that the plaintiff acquiesced in the judgment by paying a large amount thereof, and therefore he can not appeal from that judgment or enjoin its execution.

The fallacy of this position consists in the assumption that it is a judgment. Whether it is or is not a judgment, is the question for decision. We are of opinion that it is not a judgment; the law did not authorize the rendition of a judgment at the time when it was rendered.

In *Simonds & Co. v. Leovy et als.*, 21 An. 306, this court held: "The law maker has been careful to express for what particular proceedings and business the courts shall be open all the year, and the act necessary for making judgments in other matters final, not being mentioned, is excluded."

If the judge was without power to make a judgment final by affix-

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ing his signature to the judgment, *a fortiori*, he is powerless to try and decide a case, and sign the judgment.

The judge *a quo* held that, under article 10 of the Constitution, courts must be considered as always open, and that judges had the right and power at any time to open court, hear and decide cases, and sign judgments. Article 10 declares: "All courts shall be open, and every person for injury done him in his land, goods, person or reputation, shall have adequate remedy by due process of law," etc. Open here means the opposite of closed or secret—free of access—and it may also mean that litigants shall have the right, during all the year, to institute suits in the courts. But we think the article is not susceptible of the interpretation placed upon it by the learned judge of the district court.

The defendant also insists that an injunction can only be granted for one of the causes enumerated in the Code, and that the ground alleged in the petition is not enumerated as a cause for injunction in the Code of Practice.

Article 303 declares: "Besides the cases above mentioned, courts of justice may grant injunctions in all other cases where it is necessary to preserve the property in dispute, during the pendency of the action, and to prevent one of the parties, during the continuance of the suit, from dilapidating the same, or from doing some other act injurious to the other party."

"A party may always have an injunction when the act would give a claim for damages." 5 N. S. 501, Carraby et al. v. Morgan. Article 10 of the Constitution declares that every one shall have adequate remedy for injury done him in his property or person. C. P. 296.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that the injunction be perpetuated. It is further ordered that the defendant pay costs of both courts.

Rehearing refused.

Messrs. Justices Howe and Howell dissent in this case, for reasons to be filed.

HOWE, J., *dissenting*. *First*—I do not understand how it can be maintained that the judgment sought to be annulled in this case is not a judgment. The plaintiff, in his petition, calls it a judgment, and his principal prayer is as follows (Record, p. 6):

"Therefore petitioner prays that said A. B. James be cited to answer this petition, and that after due proceedings it be ordered, adjudged and decreed that the judgment rendered in favor of said A. B. James and against petitioner, in the case of A. B. James against

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Fellowes & Co., No. 17,054 of the docket of this court, be decreed to be null and void and of no effect," etc.

This judgment was rendered and signed by a competent judge, sitting on his bench, with a clerk and sheriff and in open court. The plaintiff admits (also in his petition) that the court was open for some purposes, as for the trial of interlocutory orders, and for the trial of certain suits (landlords'), and the rendering of final judgments therein. Record, p. 5. The court being open for some purposes, and especially for the rendering of some final judgments, how can it be said that the judgment against Hernandez, which he admits to be a judgment, is no judgment? It may be a judgment tainted with an irregularity, but irregularity is one thing, and nonentity is another.

Second—Assuming, then, that this is a judgment, the plaintiff has acquiesced in it by the payment, after long negotiation, of \$7000 on account. He does not pretend that he does not owe the rest of the principal. The dispute is about a difference between five and eight per cent. interest. The judgment, being acquiesced in, can not be the subject of any remedial action. The courts have business enough on hand without spending their time in reopening such cicatrized wounds. See *Abbott v. Wilbur*, 22 An. 368, and cases there cited on this point.

Third—The alleged nullity in this case is one of form, as distinguished from those nullities which pertain to the merits of the case. C. P.

In *Blank v. Speckman*, lately decided, 23 An. 146, we held that a judgment could not be annulled for any vice of form save those catalogued in C. P. 606. This case is not in this category, and therefore no action of nullity lies. The proper remedy is by appeal. 9 La. 79; 9 An. 197; 9 An. 428; 10 An. 641; 14 An. 656.

Fourth—No injunction could be lawfully issued in this case, the remedy by suspensive appeal being exclusive and ample. The case of *Conoly v. Morgan*, 5 N. S. 501, is not opposed to this view. The injury arrested in that case is distinctly mentioned in C. P., article 292. The statement in that case is that "a party may always claim the aid of the laws of his country to prevent a wrong which, if inflicted, he could claim damages for," is true in a general sense, but if meant to apply to prevention by writ of injunction, was a *dictum*, unnecessary and too broad. Courts do not grant injunctions to prevent apprehended assaults and batteries, though if inflicted they may give a claim for damages. C. P. 303, applies, by its terms, only to property in dispute, and its subsequent general phrases must be limited to such property.

Fifth—If the merits of the case be examined, it is by no means clear that there was any error in the judgment. The object of law, its *raison d'être*, in civil matters, is the speedy collection of debts. Against the surety on an appeal bond, who has helped to delay the creditor for

some weary years, the law accords a summary remedy by rule—"by mere motion." C. P. 596. The courts of New Orleans, unlike those in the rural parishes, are open every month for motions. The plaintiff admits this in his pleadings. They are open also for some final judgments. He admits this fact in his petition. I do not perceive, then, any harm, but great justice, in giving the judgment as it was given in the district court. Otherwise, if the Supreme Court affirm a judgment at the close of its session, the successful appellee may be obliged to wait nearly six months before he can avail himself of what the law has, I presume, with no intention to be ironical, called a "summary remedy by mere motion."

HOWELL, J. I concur in the above opinion of Mr. Justice Howo.

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No. 2080.—HEIRS OF WENDERLIN DOLL v. JAMES KATHMAN.

A purchaser of property at judicial sale acquires an indefeasible title by complying with his bid. In case of an active violation of the contract of purchase by the purchaser, or in case of open refusal to comply with his bid after demand, default is not necessary as a condition precedent to the action for the rescission of the sale and the recovery of damages. But if no demand has been made on the purchaser to comply with the terms of the sale, then, and in that case a putting in default would seem to be a condition precedent to recovery.

As a condition precedent to the action for the rescission of contracts and the recovery of damages for the nonperformance of engagements, the putting of the party in *mora* is strictly required, and the default must be made certain.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. C. Roselius* and *A. Philips*, for plaintiffs and appellants. *G. Schmidt* and *Fellows & Mills*, for defendant and appellee.

TALIAFERRO, J. The plaintiffs sue to recover certain real estate in New Orleans, alleging the defendant is in the possession of it, and illegally withholds it from them. The defendant denies that the plaintiffs have any right to it, and sets up title to the property in himself, averring that he bought it at a probate sale of the succession of the plaintiffs' father, Wenderlin Doll. The judgment of the court *a qua* was in favor of the defendant. The suit was dismissed, reserving to the plaintiffs any right they may have to enforce the payment of the price at which the defendant bought the property. Plaintiffs have appealed.

Prior to the institution of this suit and as far back as 1861, the defendant, Kathman, brought a suit in the Second District Court of New Orleans against the administrator and heirs of Wenderlin Doll, who died in February, 1861, to obtain title to an undivided half part of various lots of ground and buildings thereon, the lot and buildings at the corner of Bienville and Marais streets, forming the object of the

present controversy, alleging that at the time of the purchase by Doll of the property from Massey, he in fact acquired an interest in the purchase although the title was taken in Doll's name, and that by an agreement between himself and Doll the latter was to make Kathman a title upon the payment by him of \$7500. He averred that by this agreement all the property which they owned in the Second District of New Orleans was to remain under Kathman's control and administration. That he was charged no interest on the sum he agreed to pay Doll, and that he was to be credited with one-half the net revenues of the property as they were collected.

It seems Kathman had the property in dispute, as well as all the other property which he alleged was jointly owned by himself and Doll, in the Second District, from the early part of the year 1859, Doll having purchased from Massey in March of that year. This suit in the Second District Court was protracted for a great length of time. The administrator of Doll's estate filed an exception to the suit in May, 1864, and in January, 1866, the heirs of Doll answered, denying any right in Kathman to claim what he demanded, and set up a reconventional demand against him for large sums alleged to have been collected by him in rents and revenues of the property in his possession, and which were unaccounted for. In May, 1866, this suit was dismissed by order of the court. In November following, upon a rule to have the case reinstated on the docket, the rule on exception by the offering counsel was discharged. Here, this branch of the litigation between the parties seems to have ended.

In January, 1862, the property of Wenderlin Doll's succession was sold at public sale, and Kathman bought the property for which he is sued in the present action. The price was \$8000, one-third cash, the remainder in one and two years, with mortgage retained, and interest at eight per cent. from date.

The defendant, it is charged, has never paid any part of the price of the property, and it is not shown that he has. It is argued on the part of the plaintiffs, that never having paid for the property, he is not the owner of it. It is not shown, however, that the heirs or any person authorized have ever made any demand of payment, or that the defendant has been put in default, a condition precedent to the right of the plaintiffs to recover. It was on this ground that the judgment of the district court was rendered, and the main question in this case is, whether from the facts shown, a formal putting in default was necessary. The rule we take to be well settled that where there are negative or passive breaches of contracts a default is necessary; but they are not necessary where positive breaches take place. This court in the case of *Washburne v. Green*, 13 An. 333, an authority cited on behalf of the plaintiffs, laid down the doctrine that "although article

3586 of the Civil Code declares that the adjudication completes the sale, yet, it was never the intention of the lawgiver to say this consequence should follow, and the sale should be complete where the purchaser had *refused* to comply with the terms of the sale on demand, and had been decreed by the judgment of a competent court to be in default." And in the same case the court said further: "The purchaser at a judicial sale acquires such a vested right to the property by the adjudication that it can not be divested and taken from him unless he *refuses* to comply with the terms of the sale. It is in his power by a compliance with the terms of the sale to become the owner by indefeasible title. It can not be taken from him. In this sense the adjudication is the completion of the sale. But if the purchaser refuses to comply with the terms of the sale he is considered as never having been owner, saving to the vendor his right to compel a specific performance of the contract." Many decisions are to the same effect. There are among them 14 La. 533, 590; 5 L. R. 472; 15 La. 398; 2 An. 361; 14 An. 449.

In the case at bar, as we have before remarked, we are not shown that the defendant has ever been applied to amicably or by judicial demand to comply with the terms of the adjudication. How then can it be said that he ever refused to comply? For the plaintiffs it is responded that the law is satisfied by any evidence which indicates an intention not to comply with the adjudication. It is argued that Kathman was guilty of an active breach of the contract by continuing to prosecute a claim as owner of the property under an alleged antecedent and conflicting title until long after the institution of the present suit. Under the circumstances a formal putting in default may possibly have been a vain and useless thing, not required to be done. But, after all, would it not be mere conjecture to say that the defendant would not have complied if a proper demand had been made? Do the facts relied upon as evidencing an active positive breach of the contract, render it legally certain that a demand would inevitably have been followed by a refusal? We must keep in mind that the heirs of Doll permitted the defendant to remain in uninterrupted possession of the property from the death of their ancestor in 1861, until the institution of this suit in July, 1866, after the judgment had been rendered against him in his suit against the heirs for one-half of all the property. The administrator too received from him revenues of the property. After the defendant's failure in that suit, he may have thought it best to pay for the property he bought at the probate sale. At all events, during this long period, no proper demand was made, and consequently no direct absolute and positive refusal was made. We are referred to the cases of *Rowley v. Kemp*, 2 An. 360, and *Pendarris v. Ware*, 14 An. 449, as more especially in support of the position as-

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sumed on the part of the plaintiffs; but we do not consider them as bearing on the case at bar. In *Rowley v. Kemp*, it is said that "Rowley, as agent of Lansing, bid for the property, and it was adjudicated to him, and he not complying with the terms of the sale, the sheriff re-advertised the property for sale, treating the acts of Rowley, attorney in fact, as nullities, as he was bound to do; for his conduct throughout shows that his sole object was to embarrass the proceedings of the sheriff, and defeat the process of the court." But we learn further, that Rowley *refused* to comply with his bid, and the reasons assigned for his refusal were not satisfactory to the court. In the other case, *Pendarris v. Ware*, there was an active breach of the contract, because the widow tendered in payment of her bid, not money, which was required by the terms of sale, but claims against the estate of her deceased husband, and positively declared she would give nothing else.

As a condition precedent to the rescission of contracts and to the recovery of damages for the nonperformance of engagements, the putting the party *in mora* is strictly required; and the default must be made clearly to appear.

We think the plaintiffs in this case have not made out the alleged refusal of the defendant to comply with the terms of the sale with that precision and clearness which, in our opinion, the law requires.

The conclusion we have arrived at renders it unnecessary to pass upon the several bills of exceptions found in the record.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs

No. 2300.—BENNER & RANLETT v. J. T. MICHEL and P. GALLAHER.

The fact that the owner of a drug store permitted a party, who was employed therein as a clerk, to manage its affairs for a share in the profits, to hold himself out to the world as the owner thereof, did not give a judgment creditor of such clerk on a debt which originated before he had any connection with the store as a clerk, the right to seize and sell the store as the property of the clerk, in satisfaction of the judgment against him individually.

The sheriff and seizing creditor are liable, *in solido*, in case the sheriff has seized and sold the property of a third party, after being notified that such property was not that of the judgment debtor; and in fixing the amount of liability, the estimate placed on the property shortly before the seizure will be taken as a basis, rather than the vague appraisement made at the time of the sale.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. G. W. H. Marr and J. N. Brickell*, for plaintiffs and appellees. *W. T. Scott and E. C. Kelly*, for defendants and appellants.

TALIAFERRO, J. The defendants are sued for \$2000 as damages alleged to have been sustained by the plaintiffs from the illegal seizure and sale under execution by defendants of the property of the plaintiffs. The answer is a general denial. Plaintiffs had judgment for \$1000, and defendants have appealed.

Gallaher having obtained a judgment against B. F. Hughes, caused execution to issue, and the sheriff, Michel, seized as property of Hughes the contents of a drug store in the city of Jefferson at the corner of Magazine and Jena streets, and after an inventory and appraisement of the effects seized and advertisement made, sold the entire stock for \$163.

It is in proof that after the seizure was made the sheriff was distinctly informed by Benner, one of the plaintiffs, that the property seized did not belong to Hughes, but to himself and Ranlett.

The defendants show that the contents of the drug store were under the control of Hughes, who held himself out to the world as the owner; that he kept the establishment, made sale of the drugs, and was considered the owner. They contend that the plaintiffs' claim as owners is simulated, and set up to screen the property of Hughes from the pursuit of his creditors.

It appears from the evidence that in the latter part of the year 1865, and in the early part of 1866 this apothecary establishment belonged to a Dr. Hynes, who, during the time he kept it, had Hughes employed as a clerk; that Hynes sold the establishment to Ranlett, at the price of \$1700, the estimated value of the entire stock, as appears by the receipt of Hynes, dated seventeenth March, 1866. An instrument is in evidence dated eleventh of March, 1866, and signed by Ranlett and Hughes, the purport of which is that they were to carry on the drug and apothecary business in the city of Jefferson; that the business was to be carried on in the name of B. F. Hughes, who was to keep the accounts and render a full statement of affairs at the end of each month and pay over to Ranlett such sum of money as might be on hand after deducting the expenses of carrying on the business. Ranlett was to buy the stock in trade of Hynes, the profits and losses to be equally divided.

The seizure was made on the ninth of August, 1867. On the nineteenth of June previous an estimative inventory of the stock of drugs on hand was made and, as stated, the value of the drugs was set down according to wholesale prices, the aggregate amount being \$1103. Hughes testifies that between the time of making the inventory and the seizure there was sold an amount between fifty and one hundred dollars. The sheriff's inventory and estimate seem to have been made carelessly, and the drugs set down at about what the appraisers judged they would be likely to bring at an auction sale.

The fact that the plaintiffs permitted Hughes to hold himself out to the world as the owner of the establishment would, according to well established principles, involve a responsibility to persons giving him credit on the faith of the pretended ownership. Still, under the facts shown in this case, we think no liability results against them. The

judgment of Gallaher against Hughes arose from a debt contracted jointly by the latter and one Spann, before Hughes had anything to do with the drug store. The defendants were notified that the property they had seized belonged to the plaintiffs, but they proceeded notwithstanding to sell it, and consequently the sale was made at their peril.

The evidence, we think, sufficiently shows that the plaintiffs were the owners of the property sold. Hughes was destitute of means. That Ranlett paid the whole price of the stock purchased from Dr. Hynes, there can be no doubt. The statements of Ranlett and Hughes, in connection with the receipt of Hynes, make this clear, and the tenor of the contract between Ranlett and Hughes corroborates their statements under oath as to the ownership of the stock in trade. If Hughes were to participate in the profits, it does not follow that there was a community of interest in the property itself. The contrary, we think, is established.

In estimating the value of the plaintiffs' property sold, we are inclined to adopt the opinion of the judge *a quo*, who assumed the valuation made shortly before the seizure as more reliable than the evidently vague appraisement made at the time of the sale. Deducting one hundred dollars, the amount sold after the first appraisement or valuation, from \$1100, he gave judgment for \$1000, and we think correctly.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs

Rehearing refused.

No. 3330.—STATE ex rel. H. E. SHROPSHIRE v. THE JUDGE OF THE FIFTH DISTRICT COURT, for the parish of Orleans.

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On application for a writ of prohibition against the judge *a quo*, the Supreme Court will review the evidence taken in the court below, touching the solvency and sufficiency of the surety on the appeal bond, and if the surety is found to be sufficient and the case is in other respects appealable, the prohibition will issue.

APPPLICATION for prohibition. *Fellows & Mills*, for relators. *Charles Leaumont*, Judge, respondent.

Howe, J. The application for a prohibition in this case, to preserve the appellate jurisdiction of this court and the right of the relator to suspend execution pending the appeal, involves the sufficiency of the surety on the appeal bond. The bond is for \$900; the surety declares he is worth that amount over and above his debts; and that his property consists of real estate worth \$6000, encumbered for \$4000. No evidence is offered to contradict these statements, and we do not see why they are not conclusive in establishing his sufficiency.

It is therefore ordered that the prohibition granted herein, be made perpetual.

Hubener, etc., v. The New Orleans and Carrollton Railroad Company et al.

No. 2284.—GEORGE HUBENER, etc., v. THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY et al.

In this case the evidence establishes that a small boy, eight years old, a son of the plaintiff, attempted, while the steam car was in motion, on the way from New Orleans to Carrollton, to jump from the ground near the track to the platform of the car; that he was thrown from the car to the track, and one of his legs cut entirely off by the wheel of the car. It is further shown that shortly before the accident he was told by a person on the car not to attempt to get on, that he would get hurt, etc.; that the boy was not a passenger on the car, which had then left the station and was in motion on the track:

Held—That the accident having occurred to a person, not a passenger, without any fault or blame on the part of those in charge of and running the cars, the company was not therefore liable for the damages caused by the injury which such person had received on account of the accident.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. J. B. Cotton & Levy*, for plaintiffs and appellees. *L. E. Simonds*, for defendants and appellants.

This case was tried by a jury in the court below.

HOWE, J. Action for damages alleged to have been caused by carelessness of defendants in running over the child of plaintiffs, aged eight years, and cutting off one of his legs. Verdict and judgment in favor of plaintiff, George Hubener, as natural guardian of the child, for \$7500, and in his own right for \$2500. Appeal by defendants.

The child, Charles Hubener, testified that he was coming down St. Charles street in one of the horse cars of the company; that some ladies got in, and he rose and gave them his seat, and went out on the front platform; that while there another boy crowded him off; he fell backwards, yet fell on his face. This was near Calliope street. He saw the steam train coming out of the depot at Tivoli Circle before he fell. He then stumbled, according to his own account, backwards under the wheels of this upward bound steam train, and suffered the injury from which the suit originated.

The following questions and answers are taken from the record of his testimony:

“Question. As you fell from the car, you say you fell backwards from the platform?”

“Answer. Yes, sir.

“Q. And your legs, as you say, fell over on the steam car track?”

“A. Yes, sir.

* * * * *

“Q. At the time the car ran over you, were you standing up with one foot out, or were you on the ground, fallen

“A. I stumbled.

“Q. But did you stumble and fall?”

“A. I stumbled off the horse car, over the middle horse car track, with my leg on the steam track.”

It is clearly shown by a witness of plaintiffs that the distance over which the child declared he thus “stumbled backwards,” was nine-

Hubener, etc., v. The New Orleans and Carrollton Railroad Company et al.

teen feet eight and one-fourth inches. It was shown, also, to be made up as follows: From the down horse track to the up horse track, six feet; up horse track, in width, four feet eight and one-half inches; from up horse track to river or left side of steam track, about nine feet; and that between the tracks there were draining gutters, and between the up horse track and the steam track there were piles of rubbish, some as high as two feet. But, furthermore, the evidence establishes that the child was run over on the right hand side of the steam track, going up, or the swamp side, which would increase the distance over which he stumbled backwards to about twenty-four feet, or as a witness for plaintiffs says (page 468), twenty-six and one-half feet. And it must be further noticed that to have got from the car from which he was pushed to the rail on which his leg was crushed, he must not only have stumbled backwards over two gutters, two sets of railway tracks and some piles of rubbish, but must have passed over or under or around a steam train, by one of the rear cars of which he was injured, his leg lying on the right hand or "swamp side" rail.

We apprehend that we shall not be asked, in earnestness, to believe this story. Not that the poor boy has with design told a falsehood—it is not necessary to say that—but he was a little child when the accident occurred, and he was still a child when the trial took place, about a year after. "When a child is a witness," says Mr. Ram in his *Treatise on Facts*, page 151, "it will be natural to receive its evidence with proper caution. A child may be very quick to perceive aright some things which it sees or hears; but from want of knowledge or experience it may perceive imperfectly other things it sees or hears. In seeing it may mistake one thing for another, and in hearing may misunderstand words, and for those which it heard may substitute others of a very different meaning. And there is danger lest a child should *borrow something from its imagination*, or from what it has heard *other people say*, and so amplify facts beyond their just measure. But a child is naturally artless and means to speak the truth. It is not to be forgotten, however, that a child is open to be beguiled, biased, influenced, or intimidated by the false representations or the promises or threats of designing persons."

To this it may be added that the memory of children is very treacherous, and their judgment of time, distance and cause and effect very defective.

Peter Lurges, a boy of twelve or thirteen, testifies in a very credible manner that he saw the accident; that the boy Charles Hubener jumped on the steps of the steam car on the swamp side of the track, and then slipped off and so was hurt. The attempt made to contradict his statements in some particulars was a signal failure. Record, pages 468 to 473.

Coleman (page 284) testifies that the boy Hubener stated to him that he got hurt trying to jump on the *steam* car.

Mrs. Bevans, who nursed the boy, says he told her (page 415), "I was on the *steam* car, and the boy pushed me off and the steam car ran over me."

The testimony of Flanagan, a witness residing in the parish of Jefferson, was taken by commission, and then excluded by the judge because another witness had stated casually, on cross-examination at the trial, that he had seen Flanagan in the city that morning. The defendants reserved a bill of exceptions to this ruling, a ruling clearly erroneous. The testimony had been regularly taken. C. P. 425. The witness resided in another parish, and we fail to perceive how the fact that another witness had seen him in the city that morning, could establish the ability of the defendants to produce him in court or cast on them the duty of doing so. His testimony (page 78), which should have been laid before the jury, shows that the boy Hubener was playing about the steam cars about the time they started, "hanging on the steps," and that he told him "to go away from there or he would get hurt."

The statements of the boy Klein, for plaintiffs, are not in necessary conflict with those quoted for the defense.

We gather from the record, as a whole, that the boy may have been pushed from the platform of the horse car, as he says he was, but that this fact had no causative relation to the subsequent injury, any more than if it had happened an hour or a year before; that finding himself left behind, he went across and attempted to amuse himself by jumping on the platform of one of the steam cars, which were moving slowly up on the farther side of the street or neutral ground; that he probably had time to cross the steam track before the train came up, and when he attempted to get on, jumped up from the swamp side. It was at this moment that young Lurges saw him, and a moment after he fell and was injured. "He was jumping on," says this witness, page 201, "with his two knees when he fell." He was not a passenger on this steam train. The company owed him no duty as a common carrier, and no greater duty than they owe to all who walk the streets—the duty of running their trains lawfully and carefully. This train was running very slowly and carefully, and it nowhere appears that by any fault of defendants was the unfortunate child injured. The verdict of the jury is without foundation.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside. It is further ordered that there be judgment in favor of the defendants herein, with costs in both courts.

Rehearing refused.

Bormann v. Thiele, Motz & Co.

No. 2348.—R. BORMANN v. THIELE, MOTZ & CO.

2da 495
62 2100

A person who makes a contract with a mercantile house or firm to act in the capacity of clerk and book-keeper in the store for a fixed rate, or price, and for a fixed period of time, on being discharged by his employers before the expiration of the time agreed upon, without any just cause therefor, is entitled to sue for and recover his wages for the entire time of his employment

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. D. Craig*, for plaintiff and appellee. *O. E. Schmidt*, for defendants and appellants.

HOWELL, J. This case presents the questions of fact, whether or not plaintiff was employed as clerk by the year, and defendants had good cause to discharge him.

After an examination of the evidence, we concur in the conclusion of the district judge, that he was so employed, and that he was discharged without sufficient cause.

The positive testimony of plaintiff, as to the term of the engagement is supported by the letter of the defendants, informing him of their decision to reduce his salary from \$1500 to \$1000 per annum, which also shows that the only reason for this reduction was to curtail expenses. Because of plaintiff's refusal to acquiesce therein, he was discharged.

This view of the case renders it unnecessary to consider the bills of exception in the record.

Judgment affirmed.

No. 2279.—EMILE DUPRE v. BOYD, ALLEN & CO.

Planting partners are bound jointly, each for one-half of a debt contracted by them for the benefit of the partnership.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. A. & M. Voorhies*, for plaintiff and appellee. *Trudeau & Philips*, for defendants and appellants.

WYLY J. The defendants have appealed from a judgment against them for balance of account and for commissions on a part of the crop of rice which they failed to consign to the plaintiff for sale, he claiming as their commission merchant, the right to the same. The balance of account, to wit: \$276 69, the defendant, Boyd, in his evidence admits to be correct. He, however, contradicts the statement of the plaintiff, who testified that he advanced the rice seed to the defendants upon the condition he was to have the sale of the entire crop. It appears that the plaintiff did not advance the supplies generally to make the crop, but only advanced the seed; we believe that the witness, Boyd, has stated correctly the understanding upon which the seed was advanced; and that the plaintiff has failed to make his demand suffi-

Dupre v. Boyd, Allen & Co.

ciently certain to entitle him to recover judgment for two and one-half per cent. commissions on that part of the crop consigned by the defendants to other merchants. Besides, he has not shown the value of the balance of the crop diverted from him, assuming that the advance by him of one item entitled him to the right to sell the whole crop. The defendants, Boyd & Allen, were planting partners, and are therefore liable, each for half the debt due the plaintiff.

It is therefore ordered that the judgment against the defendants be reduced to the sum of one hundred and thirty-eight dollars thirty-four and one-half cents, against each of them, with five per cent. per annum interest thereon, from the twenty-third day of October, 1868, and as thus amended it is ordered that the judgment herein be affirmed.

It is further ordered that the plaintiff pay costs of this appeal.

No. 2534.—DANIEL CLARK OSBORN, Testamentary Executor, et als. v. JOHN C. OSBORN et als.

In a suit by executory process to enforce the payment of mortgage notes shown to be for a mixed consideration, partly for lands, and partly for slaves, an injunction taken out to prohibit the sale on the ground that the consideration of the notes is illegal, will be dissolved to the extent of the consideration shown to be for the lands, and maintained for that portion of the consideration which is shown to be for slaves. 21 An. 757, 771

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. C. Roselius and Alfred Philips*, for plaintiffs and appellees. *R. King Cutler*, for defendants and appellants.

WYLY, J. The defendant, John C. Osborn, has appealed from the judgment perpetuating the injunction sued out by the plaintiffs to restrain the execution of an order of seizure and sale obtained by the said defendant, against certain property inherited by them from the late Winney Hubbard, deceased. The main ground for the injunction was the slave consideration of the note, on which the order of seizure and sale was granted. It appears that in 1854, the late Winney Hubbard, from whom the plaintiffs derived title, purchased the undivided half of a plantation, and sixty-five slaves, in the parish of Jefferson, for the price of \$40,000; and that the note on which this order of seizure and sale was granted, is the last installment due on said purchase. It is admitted that the value of the land was \$25,000, and the slaves \$15,000, embraced in said sale. There was no conventional imputation of the payments heretofore made, and under the settled jurisprudence of this State, the debt must be apportioned, and can only be enforced for the part which was not for slaves. This apportionment, under the admission of the parties, we fix at \$3000, the amount of the note being \$5000. 21 An. 757, 771.

It is therefore ordered that the judgment appealed from be avoided

D. C. Osborn et als. v. J. C. Osborn et als.

and annulled, and it is now ordered that the injunction herein be dissolved so far as to permit the defendants to proceed with the order of seizure and sale to enforce the payment of \$3000, the valid part of the mortgage note, with eight per cent. per annum interest thereon from the first day of April, 1868, and costs, and in other respects that the injunction be maintained.

It is further ordered that the defendant, John C. Osborn, pay costs of the injunction, and that the plaintiffs pay costs of this appeal.

No. 3094.—CHARLES CASE, Receiver of the First National Bank of New Orleans, v. RICHARD TAYLOR.

23	497
51	293

A right resulting from a contract of labor between the State on the one hand and a private citizen on the other, is not liable to seizure for the debts of the latter. The contract entered into between the State of Louisiana on the one hand and Richard Taylor on the other, whereby the said Richard Taylor bound himself under bonds to widen and deepen the New Canal and to keep it in repair for a given time, for which the said Richard Taylor is to have and enjoy the tolls arising from the use of said canal and shell road by the public, is a contract resulting from the obligation to perform the labor of widening, deepening and improving the canal, and the tolls arising therefrom are not, therefore, liable to seizure by the judgment creditors of the said Richard Taylor.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.*
J. D. Rouse and Elmore & King, for plaintiff and appellant. *W.*
H. Hunt and C. Roselius, for defendant and appellee.

WYLY, J. The plaintiff has appealed from a judgment perpetuating the injunction sued out by the defendant restraining the plaintiff, his judgment creditor, from selling "all the right, title and interest of the defendant in and to the lease of the New Canal, granted to him by the State of Louisiana, as per act passed before T. O. Stark, notary public, March 6, 1866, together with his right of use and enjoyment of said canal thereunder and the revenues thereof."

The main question in this controversy is, what is the character of the thing or right the defendant has enjoined his judgment creditor from selling? Is it the lease of a thing, or is it a contract for labor, skill or industry? If it be the lease of a thing, there is no doubt that the right of the lessee may be seized and sold by his judgment creditor. 11 An. 432; 14 An. 217; 17 An. 174.

If, on the other hand, the contract seized has for its cause the labor, skill or industry of the defendant in operating and administering the public highway belonging to the State, the right of the defendant, the obligor in said contract, is not liable to seizure. "All contracts for the hire of labor, skill or industry, without any distinction, whether they can be as well performed by any other as by the obligor, unless there be some special agreement to the contrary, are considered as personal on the part of the obligor but heritable on the part of the obligee."

Revised C. C. 2007. Rights which are merely personal and of this character are not liable to seizure for the payment of debts. Revised C. C. 1992.

The right of the defendant to collect the tolls of the canal and shell road on the day the seizure was levied was the right which he held by contract with the State under the acts of 1866 and 1867. Under these acts and the act of 1870, the defendant acquired the right to collect the tolls imposed by law, and he incurred the corresponding obligation to do certain works for the State, to wit: to widen and deepen the canal, to construct certain basins and other works as stipulated, and to keep the canal and shell road in good order. It seems to us that the right of the defendant which has been seized is a right resulting, not from a contract of lease, but from a contract for labor. As a remuneration for repairing, enlarging, improving and keeping in order the canal and shell road, its public highway by land and by water from the city to the lake, the State has given the defendant the right to collect the tolls thereon for a limited time. For the faithful performance of this work, the defendant has given securities accepted and approved by the State.

The contract before us, as modified by the acts of 1867 and 1870, is not a lease, because there is no fixed price, which is one of the essential elements of the contract of lease. Revised Civil Code, articles 2670, 2671. It matters not what name the parties have given to the instrument, its character is determined by its constituent elements. We therefore regard the right of the defendant, arising from his contract with the State, as a recompense for the personal services he has bound himself to perform for the State during the period of the contract; and this being a personal right, is not liable to seizure by virtue of article 1992 of the Revised Civil Code. Taking this view of the merits, it becomes unnecessary to consider the other questions presented for adjudication.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

Mr. Justice Howe is recused in this case.

TALIAFERRO, J., *dissenting*. I dissent from the opinion of the majority of the court for the following reasons:

The rights and credits of a debtor may be seized under execution. Code of Practice, article 647. The right of the debtor in the present case is the right to receive the tolls of a public canal under a contract with the State to do certain work on that canal. I know of no law that prohibits the seizure of the defendant's right under this contract. What, then, is in the way of the judgment creditor's seizing and selling,

Case v. Taylor.

in default of any other property of his debtor, this right to receive the tolls of the canal to any person willing to buy it under the condition of performing the labor required to be done on the canal? The objection against doing this is said to be that the State has an interest in this contract, and the contract can not be interfered with by the substitution of another party in place of the one with whom the State contracted. But the obligation of the party bound to the State in this case is not a personal obligation. Hundreds of men could be had at any time to perform all the required labor as promptly and efficiently as it is now done. It is easy to perceive that there is no difficulty whatever in the matter of substituting another contractor, and equally easy to see that no injury could thereby arise to the State. The State has no right to object to such a substitution. It would comport indifferently with its dignity to undertake thus to screen a debtor from the pursuit of his creditors. The intervention of the State was unnecessary and uncalled for, and should be dismissed. The injunction should be dissolved, and the plaintiff allowed to maintain his seizure and proceed to a sale of the rights seized

No. 2236.—ROBERT H. DIXEY v. PETER C. MANDELL—R. KING CUTLER,
Warrantor.

A judicial sale of real property to satisfy a mortgage, under executory process issued from a competent court, which is clothed with all the forms and requirements of law, can not be regarded and treated as an absolute nullity. In a proceeding to annul and set aside a sale of the kind, all the parties interested in the sale and transfer must be made parties to the suit. In such a proceeding, if the purchaser is not made a party, the suit will be dismissed on that account.

In a petitory action the plaintiff must make good his title, otherwise he can not recover.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. D. C. Labatt*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant. *E. Filleul*, for warrantor.

TALIAFERRO, J. On the thirteenth of January, 1862, Dixey, the plaintiff, bought a lot or square of ground in the parish of Jefferson at the price of \$14,966 66. He paid part of the price in cash and executed two promissory notes, each for \$4216 66, payable respectively on the thirteenth of January, in the years 1863 and 1864, and secured their payment by special mortgage on the property. Salvant, as owner and holder of the note last falling due, applied to the judge of the Second Judicial District of the parish of Jefferson on the second of February, 1864, and obtained an order of seizure and sale of the mortgaged premises, and after the usual proceedings the property was sold by the sheriff on the twentieth of April following and adjudicated to R. King Cutler, the last and highest bidder. In October, 1866, Cutler sold the property to Mandell, the present defendant. This suit

is brought by Dixey to annul the sale made under the order of the judge of the Second Judicial District of the parish of Jefferson and to recover the property, with fruits, revenues, etc., and for damages. He alleges that the sale of the property is null and void for various reasons. He avers that the Second Judicial District Court of Jefferson, at the time of the rendition of the order, was without jurisdiction over the subject matter; that foreclosures of mortgages were forbidden at that time by a military order of the commander of the Department of the Gulf; that the proceedings were otherwise defective and null; that he was never cited or served with notice of seizure or with any other notice of any kind of the proceedings taken against him; that the sheriff's return showing personal service of citation is untrue; that the proceeding gotten up against him is fraudulent and intended to injure him and to deprive him unjustly of his property.

The answer is a general denial. The defendant called his warrantor, Cutler, in warranty. The warrantor avers that he acquired a legal title to the property by virtue of the sheriff's sale. Excepts to the petition of the plaintiff as attacking collaterally and indirectly the sheriff's deed. Especially avers that the plaintiff has failed to refund the price received by the sheriff and applied to the payment of the plaintiff's debt.

The case was tried twice in the court below with the same result, that of the rendition of judgment in favor of the plaintiff, recognizing him as the proper owner of the lot of ground in controversy, reserving to the defendant the right to recover from his warrantor the purchase money paid him, with all interests, damages and costs incurred by the eviction. The judgment also decreed that all valid mortgages that existed against the property on the twentieth April, 1864, in the name of the plaintiff, be recognized as still in force in the order in which they stood at that date, unless since paid and discharged by him.

From this judgment the defendant has appealed.

Taken as an action to annul, all the parties required in such a proceeding are not before the court. Salvant, the purchaser of the property, was not cited and does not appear in the proceedings as a party. The plaintiff has not succeeded in making out such a title as enables him to recover in a petitory action. The sale of the property, under an order issued by the judge of the Second Judicial District, can not be regarded as an absolute nullity. The prohibition of sales under foreclosures of mortgages by the military order of February 8, 1863, would seem scarcely to apply to property of the kind in this controversy. At all events, it is shown that permits were frequently granted by the commanding general for the execution of orders of sale rendered by the courts, and the evidence seems to establish that such a permit was obtained in this case. We think the sale, clothed as it is

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with the sanction of judicial authority, can not be attacked collaterally. 19 An. 69; 21 An. 420; 23 An. —

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

No. 2258.—JOSEPH CHRISTEN v. NICHOLAS KEIFFER.

Where the plaintiff and defendant both testify in the case, and that given by the one contradicts that of the other, judgment will be given in favor of the party having the preponderance of evidence, without reference to the testimony of the parties to the suit.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. Howard McCaleb*, for plaintiff and appellee. *B. R. Forman*, for defendant and appellant.

WYLY, J. The plaintiff sues the defendant to recover a sum of money which he alleges he was compelled to pay as surety for the rent of a certain beer saloon and boarding house on Hospital street. That although in the notarial act of lease, Mrs. Richard Zorn appears as lessee, and the petitioner as her surety, in truth and in fact he signed it as the surety of the defendant, Nicholas Keiffer, who was the owner of the contents of said leased premises, and the proprietor of said saloon and boarding house. That he signed said contract at the request of, and for the said Nicholas Keiffer, who represented to him that he was the proprietor and lessee, and that the contract was made and the business carried on in the name of the said Mrs. Zorn, merely for convenience, and for the custom thereby to be drawn, and that he would pay the rent for petitioner's protection. That it was for the direct use and benefit of said Keiffer, that the plaintiff became surety for said rent, which he has been compelled to pay; and that the said Keiffer has repeatedly acknowledged his direct indebtedness to him and has promised to pay and indemnify him therefor, but has failed to do so. The answer is a general denial.

The court gave judgment for the plaintiff, and the defendant appeals. Our attention is directed to a bill of exceptions taken by the defendant, which we deem it unnecessary to consider, as the proof fails to sustain the demand of the plaintiff. The testimony of the plaintiff is contradicted by that of the defendant, both having testified in the case. The other evidence preponderates in favor of the defendant.

It is therefore ordered that the judgment appealed from be annulled, and that there be judgment for the defendant, plaintiff paying costs of both courts.

No. 2972.—JOHN M. HOYLE v. N. O. CITY RAILROAD COMPANY.

From and after the passage of the act creating the Eighth District Court for the parish of Orleans, the other district courts of the parish were divested of all jurisdiction over cases in which exclusive jurisdiction was given to the Eighth District Court. The signing of a judgment in an injunction suit by the judge of the Sixth District Court, after the passage of the act creating the Eighth District Court, is therefore null and without legal effect, because the Sixth District Court was divested of jurisdiction over the case.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiff and appellee. *W. H. Hunt*, for defendants and appellants.

HOWE, J. A judgment was rendered in this case on the sixteenth day of May, 1870, in favor of plaintiff, commanding the defendants to desist from the construction of their road on certain neutral ground mentioned in the petition. On the same day the act of the Legislature, No. 2, extra session of 1870, became a law, and divested the Sixth District Court of all jurisdiction of the cause, except to make an order of transfer to the Eighth District Court, it being an injunction suit. Twelve days after, the judge of the Sixth District Court signed the judgment. On the thirty-first May the defendants moved to transfer the case to the Eighth District Court, but the motion was denied, and thereupon the defendants appealed.

The judge *a quo* had no jurisdiction to sign the judgment

It is therefore ordered that this cause be remanded to the court *a qua* with directions to transfer the same to the Eighth District Court for the parish of Orleans, and that the plaintiff, appellee, pay the costs of appeal.

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No. 1457.—SUCCESSION OF M. MORGAN and W. R. MORGAN v. P. L. MORGAN et als. (Consolidated.)

An appeal from a judgment removing a testamentary executor from office will be dismissed, if it appear that the plaintiff in the proceeding in the lower court has not been cited, nor made appearance in the appellate court.

One coproprietor of property held in common, can not be judicially compelled to incur a debt for improvements, in accordance with the views and wishes of the other, on the property held in common. In determining a question of this kind, courts are not required to call in aid natural law and reason, because the lawmaker has made ample provision for the protection of the rights of coproprietors.

A PPEAL from the Second District Court, parish of Orleans. *Thomas, J. Bradford, Lea & Finney*, for appellants. *A. Hennen* and *B. R. Forman*, for appellees.

HOWELL, J. W. R. Morgan, as executor and heir of Matthew Morgan, deceased, and trustee named in the will, brought suit against the widows and heirs of said Matthew Morgan and of George Morgan, deceased, residing in New York, coproprietors with him of a certain valuable lot in this city, the building on which had been destroyed by fire, to have himself authorized to rebuild thereon such a store as, in

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the opinion of experts to be appointed by law, will most promote the interests of all the parties concerned, and in order to do so to be authorized to borrow \$50,000, to be secured by mortgage or lease of said premises.

The widow and heirs of George Morgan acceded to the prayer of the petition, and offered to contribute ratably to the erection of the proposed building, but asked to be saved from costs of suit. The curator *ad hoc*, appointed to represent the other defendants, answered, denying the right of plaintiff to ask and the authority of the court to grant the relief sought, and averring that all the property of the succession of Matthew Morgan situated in this State is subject to the usufruct of his widow, pending which neither she nor the children of said M. Morgan can be required to make the improvements demanded by plaintiff, who has only the naked ownership of one twenty-fourth of the property in controversy.

In the meantime, one of the heirs of Matthew Morgan filed a petition in the mortuary proceedings to rescind the order appointing W. R. Morgan testamentary executor. The two suits were consolidated, and judgment was rendered removing W. R. Morgan as testamentary executor, and granting his prayer for authority to remove the old walls on said property, or rebuild new stores under the direction of an architect appointed by the court, if not selected by the parties, at any cost less than \$75,000, and constituting him a creditor of his coproprietors for their shares of the cost, and giving the defendants sixty days to agree upon some course before the plaintiff shall exercise his choice.

From the judgment so rendered, the curator *ad hoc* or the widow and heirs of Matthew Morgan took a devolutive appeal by petition. In answer to the appeal, W. R. Morgan asked that the judgment depriving him of the executorship be reversed, and one rendered authorizing him to give security and act as executor.

If it be considered that the appellants appealed from this judgment of removal, we can not revise it, as the plaintiff in the proceeding, Edward Morgan, has neither made appearance nor been cited. Upon the other branch of the subject, it is said: "As Louisiana has no express law to regulate the proceedings and make proper provision in the matter, the court must decide according to natural law and reason. C. C., art. 21."

We are unable to recognize any law or reason in the judgment or demand. Our code has made ample provision for the protection of the rights of coproprietors of property, in which, however, is not embraced the right to judicially force one to make a contract and incur a debt for the improvement of property according to the view of another. The record discloses no grounds for a resort to the exercise of such

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equitable powers as are invoked by the plaintiff in these anomalous proceedings.

We perceive no force in the suggestion that the defendants have voluntarily carried out the decree of the lower court.

It is therefore ordered that the appeal, as to the judgment depriving W. R. Morgan of the executorship, be dismissed, and that the judgment in his favor authorizing him to rebuild on and mortgage the property in question be reversed, and that there be judgment in favor of defendants, rejecting his said demand, costs of both courts to be paid by him.

Rehearing refused.

No. 2218.—WILLIAM H. SIMMONS et al. v. HOWARD, PRESTONS & BARRETT.

In case the appellant has failed to cause a note of the evidence, on trial in the court below, to be affixed to the record, the Supreme Court will presume that the judge *a quo*, in rendering his judgment, proceeded to do so on proper and sufficient evidence.

In a proceeding to cause a judgment of another State of the Union to be made executory in this State, it is sufficient under the general issue for the plaintiff to show that the judgment which is sought to be rendered executory has been duly rendered, and that the record thereof has been properly authenticated.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Race, Foster & E. T. Merrick*, for plaintiffs and appellees. *E. Wooldridge*, for defendants and appellants.

TALIAFERRO, J. This is an action to render executory a judgment obtained by the plaintiffs against the defendants in the State of Mississippi. The defendants excepted to the proceeding on the ground that the petition and transcript filed with it, set out no cause of action; and under the allegations of the petition and the transcript setting up more judgments than one, each in favor of a separate plaintiff, the plaintiffs have no right to join in one suit, and prosecute a joint action on their separate and distinct judgments.

The defendants filed an answer denying the legal existence of either of the four judgments alleged upon; and if ever rendered, it was without citation, and without answer filed by defendants to the merits. No action seems to have been taken by the lower court upon the exception before rendering its judgment, and of this the defendants complain as irregular.

Judgment was given in favor of the plaintiffs, rendering the Mississippi judgment executory, and the defendants have appealed.

We find no note of evidence in the record. In such a case we will presume the court *a quo*, in rendering its judgment, proceeded on proper evidence. The judgment sought to be made executory, appears to have been duly rendered and the record properly authenticated.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

23	504
52	710
23	504
50	646
23	504
117	790
23	504
123	841

Leverich v. Dulin et al.—Summers & Brannins, Garnishees.

No. 2324.—CHARLES E. LÈVERICH v. J. M. DULIN et al.—SUMMERS & BRANNINS, Garnishees.

In garnishment suits, the jurisdiction is attested by the original demand. If, therefore, the claim against the debtor is above five hundred dollars, the Supreme Court will have jurisdiction of the appeal from a judgment in the garnishment process.

A judgment that has been rendered against a party as garnishee, after he has been eliminated from the suit, is void and of no effect.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. J. McConnell*, for plaintiff and appellee. *D. O. Labatt* and *J. O. Harrison*, for garnishees, appellants.

LUDELING, C. J. The appellee has moved to dismiss this appeal on the ground that the amount in dispute does not exceed five hundred dollars.

The plaintiff alleges that the defendant owes him \$2192 64, with interest and commissions; that the garnishees have forty-two bales of cotton in their possession belonging to J. M. Dulin, his debtor, and he prays for judgment, *in solido*, against them for said amount.

In suits by garnishment, the amount in contestation is the claim against the debtor and garnishees. The question of jurisdiction is tested by the demand of the petitioner. 1 La. 246; 3 R. 370; 12 Rob. 178; 2 An. 163; 13 An. 510.

The motion to dismiss the appeal is therefore refused.

ON THE MERITS.

HOWE, J. The plaintiff, in his petition, alleged that the defendant, Dulin, a resident of Arkansas, was indebted to him in the sum of \$2192 64 for plantation supplies; that Dulin had shipped forty-two bales of cotton, on which plaintiff claimed a lien, to Summers & Brannins, of this city; that the cotton had been sold and the proceeds passed to the account of R. D. Lee, in fraud of plaintiff's rights; that the cotton was the property of Dulin, and the proceeds still belonged to him, and was subject to plaintiff's lien and privilege. He prayed for a writ of attachment against the rights, credits and funds to the account of R. D. Lee in the hands of Summers & Brannins, for citation against the three parties, and judgment against all of them, *in solido*, for the full amount of his claim.

A writ of attachment was ordered as prayed for. The clerk issued a writ against the property of Dulin. The sheriff made seizure apparently of all the property of both Lee and Dulin in the hands of Summers & Brannins. A curator *ad hoc* was appointed for Lee and Dulin, but his appointment, as to Lee, was afterwards revoked, and Lee is not, therefore, a party to this suit.

Summers & Brannins being made garnishees, were required to answer the following interrogatories:

First—"Have you any money in your hands now to the credit of one Dr. R. D. Lee, and what amount?"

Second—"If yea, is said amount the proceeds of sale of forty-two bales of cotton, say of forty bales marked 'L' and two bales marked 'A' in a diamond? In this connection state fully the whole transaction." See record, p. 3.

And they answered as follows:

First—In answer to the first interrogatory they say: "They had at the time of the service of the citation, and then in this case, and yet have, only the sum of \$476 in their hands or under their control for or to the credit of said R. D. Lee. They neither had then nor since to his credit or for him any other or greater sum than \$476."

Second—In answer to the second interrogatory they say: "That said sum of \$476 was not the proceeds of sale of forty-two bales of cotton, of which forty were marked 'L,' and two of which were marked 'A' in a diamond, but were and are the balance of proceeds of sale of forty bales of cotton marked 'L,' consigned to them by R. D. Lee. The said forty bales of cotton were shipped from Douglass Landing by said R. D. Lee, on or about the sixteenth December, 1867; were consigned to these respondents; were received as the property of R. D. Lee, and the proceeds thereof are claimed and belong to said R. D. Lee, and were sold, and the proceeds thereof, except the sum of \$476, remitted to and accounted for to him before service on them of the citation herein, and before they had any notice or knowledge of the claim set up by the plaintiffs herein. They never received any cotton from or on account of said J. M. Dulin, and none in which he had any interest, so far as they were informed, know or believe. About the time they received said forty bales, as above, they received two bales marked 'A,' consigned to them by and for account of D. B. Alexander, which they sold and accounted for to him by remitting him the net proceeds, before service of the citation on them in this case, and before they had any notice of plaintiff's claim."

The plaintiff traversed these answers as untrue, and considerable testimony was taken. The judge *a quo*, after taking the matter under advisement, dismissed the rule to traverse. On motion of plaintiff, a new trial was granted on the rule, and no further proceedings appear to have been taken on it.

At this point the case may be summed up in this wise: An attachment is prayed for against funds to the credit of Lee; the clerk issues the process against property of Dulin; the sheriff attempts to seize the property of both Lee and Dulin; interrogatories are addressed to the garnishees, inquiring if they have not money to the credit of Lee,

Leverich v. Dulin et al.—Summers & Brannins, Garnishees.

and on their replying in the affirmative, the plaintiff takes a rule to traverse the answers as false; Lee is then dismissed from the suit; the rule to traverse is next dismissed, and then the same rule is reinstated and left pending.

Notwithstanding this condition of things, the next step was to give a judgment in favor of plaintiff against Dulin, and finally, on motion of plaintiff, to give a judgment against Summers & Brannins in favor of plaintiff for the \$476 in their hands, which they had declared to stand to the credit of and belong to Lee. Summers & Brannins have appealed.

It is clear that this judgment is erroneous. The answers of the garnishees are full and truthful, and they effectually dispose of plaintiff's case. Dulin was not in court, either by personal service or by any seizure of his property, and Lee had been eliminated from the controversy some time before the judgment appealed from was rendered by which it was sought to take his balance of \$476 and turn it over to the plaintiff.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the suit dismissed at plaintiff's costs.

No. 2315.—PELLEMAN M. WILLIAMS v. THE CITY OF NEW ORLEANS.

The act of the General Assembly which created a Metropolitan Police District for the city of New Orleans and took away from the city authorities the management of the police force and vested it in a Board of Metropolitan Police, did not repeal or modify the statute of 1855, re-enacted in 1869, which makes the city liable for property destroyed by a mob or a riotous assembly within the limits of the corporation. The city is, therefore, liable, under this act, for the damage done to property within the corporation, whether the owner of such property be a resident of the city or an absentee.

APPEAL from the Fifth District Court, parish of Orleans. *Leau-mont, J. Hays & New*, for plaintiff and appellee. *George S. Lacey*, for defendant and appellant.

TALIAFERRO, J. The plaintiff in this case seeks to render the city of New Orleans liable to him in the sum of \$1744, the amount of losses he alleges he sustained from the destruction and carrying off of property by a mob of disorderly and riotous persons, who, by violence, entered his dwelling on the nights of the twenty-sixth and twenty-seventh of October, 1868.

The answer is a general denial. The plaintiff had judgment for twelve hundred dollars, with legal interest from judicial demand. The defendant appealed.

The claim of the plaintiff is predicated upon the statute of 1855, re-enacted in 1869, which declares that "the different municipal corporations shall be liable for the damages done to property by mobs or

riotous assemblages in their respective limits." Revised Statutes of 1870, p. 485, § 2453.

The principal ground of defense seems to be that by the statute of fourteenth of September, 1868, entitled "An act to establish a Metropolitan Police District, and to provide for the government thereof," the city of New Orleans was divested of the power and means to maintain order and suppress riots, mobs and insurrections. This defense seems more specious than solid. The liability of municipal corporations for losses occasioned by riotous conduct within their limits, is not made to depend upon the condition of having police forces. The underlying principle on which laws of the character of the statute of 1855, re-enacted in 1869, already referred to, are founded is, that it is the interest of every one that property should be protected, and that it is for the general good that such laws should exist. When the importance of social order and the security of person and property resulting from it are impressed upon the public mind by the strong influence of pecuniary responsibility, a sharper vigilance is excited and a more efficient action aroused in regard to the prevention and suppression of riotous assemblages, by which, in large cities especially, property is so often damaged and destroyed. This usage, it appears, is of ancient origin. It prevailed among the Franks and the ancient Germans, and was adopted at a later day in other countries from nations of German descent. In England, in the districts called Hundreds, from having formerly contained each one hundred families, it was introduced at a remote period. In many cases where an offense is committed within the Hundred, the inhabitants are civilly responsible to the party injured. In other States of the Union, laws have been passed making cities or counties responsible for the destruction of property by a mob. Such a law is in force in the State of New York, and we are referred to numerous decisions in suits instituted under its provisions. Looking to the reason for the establishment of such laws and turning to our statute on the subject, we find its terms clear, positive and unambiguous. It declares that "the different municipal corporations of this State shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits." The language is plain. There are no words of limitation or qualification. We conclude, therefore, that the establishment of the Metropolitan Police force does not release the corporation of New Orleans from the provisions of this law. The equitable considerations invoked by the defense seem to possess little weight. The Metropolitan Police, although not under the control of the city authorities, is nevertheless established for the benefit of the city of New Orleans and the other places within the Metropolitan District. Section forty-one of the act establishing the Metropolitan District enumerates numerous

duties required to be performed by the Metropolitan Police. Among these, it is required, at all times of day and night, "to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress mobs, riots and insurrections, disperse unlawful and dangerous assemblages," etc.

Section fifty-one provides "that the Board of Commissioners shall, at all times, cause the ordinances of the cities of New Orleans, Jefferson City and Carrollton, and of the towns of Algiers and Gretna, and the ordinances of the parishes of Orleans, Jefferson and St. Bernard, not in conflict with the provisions of this act, to be properly enforced; and it shall be the duty of the said board, at all times, whenever consistent with the rules and regulations of the board and with the requirements of this act, to furnish all information desired by the Mayors, Common Council and other authorities of said cities and towns."

Here, then, is a competent force for all the various purposes for which it was established; a force which is to carry into execution the ordinances of the city of New Orleans and to co-operate with the Mayor and Common Council in regard to police matters concerning the interests of the city. For all that appears the duties with which this police force is charged, are performed as efficiently as if it were under the control of the Mayor and Common Council. The organization of the Metropolitan Police force does not disarm the municipal authorities of the power to use means to prevent and suppress mobs and riotous assemblages. It is provided by section twenty-six of the act of 1856, No. 164, approved March 20, and re-enacted by the act "To extend the limits of the parish of Orleans," etc., approved March 16, 1870, "That the Mayor shall be the chief executive officer of the city. He shall keep his office in the City Hall; he shall affix the seal of the corporation to all its official acts; he shall see that the laws and ordinances be properly and faithfully executed; he shall be *ex officio* justice and conservator of the peace." Acts of 1870, p. 32.

The chief executive officer of the city being constituted a justice of the peace *ex officio* and a conservator of the peace, he is necessarily clothed with all the powers incident to and conferred by law upon justices of the peace. What is there to prevent him, if need be, from calling upon the proper authorities, and resorting to the means within his power as a conservator of the peace to prevent or suppress mobs or riotous assemblages?

We think the plaintiff's case is fairly made out and that he is under the law entitled to recover.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

HOWELL, J., *concurring*. I do not consider it necessary, in this suit,

to express an opinion on the question of the powers and duties, respectively, of the city government and the Metropolitan Police in regard to the suppression of riots, as the law on which this action is based, is clear and unambiguous, is not repealed or unconstitutional and is not made dependent for its operation on the existence or non-existence of a police force, but upon the aggregate responsibility of the inhabitants, whose interest it is or should be to maintain good order, and it seems to me clear that if public sentiment is opposed to mobs, no mobs of any extent will be apt to occur.

On this ground I concur.

HOWE, J. I concur on the grounds stated by Mr. Justice Howell.

No. 2237.—J. BECK *v.* GERMANIA INSURANCE COMPANY.

A discrepancy between the value of goods destroyed by fire, as sworn to by the insured, and the value as proven on the trial in a suit against the company to recover the policy, is not necessarily evidence of fraud against the company on the part of the insured.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. A. & M. Voorhies* and *H. R. Schmidt*, for plaintiff. *J. M. Dirrhammer* and *O. E. Schmidt*, for defendant and appellant.

HOWELL, J. This is an action on a policy of insurance for the sum of \$2600, the amount specified therein as the value of a stock of merchandise and fixtures insured with defendant by plaintiff.

The defense is that the statement of loss furnished by plaintiff to defendant is false and untrue, and by reason thereof plaintiff has forfeited the insurance. Judgment was rendered for \$1800. A motion was made for a new trial on various grounds, and upon plaintiff's entering a *remittur* for \$800, the new trial was refused, and defendant appealed.

The clause of the policy relied on by appellant is in these words: "All fraud and false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy." The appellant admits that to create a forfeiture under this clause, the false swearing must be done willfully and knowingly, with a view to defraud the company; but contends that the evidence and the act of making the *remittur* show the intention to defraud, and not an innocent error on the part of the assured.

The *remittur* was the act of the attorneys, as explained by them, to avoid the delays of the law from a possible new trial and appeal, and should not enter into the consideration of the intention of plaintiff in making his statement of loss.

The testimony is conflicting as to the value of the goods destroyed, but it does not justify us in deciding that plaintiff "swore falsely with a view of defrauding the defendant," as contended. It is shown that about four months prior to the fire plaintiff acquired the store in question, which was then insured at \$2600; and he took out a new policy for the same amount, the company being unwilling to allow the policy of the vendor to be transferred as was stipulated, and that plaintiff kept the stock at about the same amount, if not greater, up to the time of the fire, and there is no good reason to suppose that he removed any part or did any act for the purpose of recovering from defendant insurance for goods not destroyed, or an amount of value beyond what he may have honestly believed them to be worth. He swears that at the time of effecting the insurance he proposed to the company to inspect the stock.

The difference between the amount sworn to by him and the value proven on the trial, is not necessarily evidence of fraud and false swearing on his part, and the circumstances of this case are not such as to impose on him any further explanation of the discrepancy than the record contains. It is often extremely difficult, if not impossible, to prove the exact value of goods insured in an open policy, and merchants may always be supposed to consider their goods worth more than they give for them. Upon the whole, we see no good reason for disturbing the judgment of the court below.

It is therefore ordered that the judgment be affirmed, with costs.

No. 3162.—J. A. ABBOTT, Collector, v. BRITTON & KOONTZ.

23	511
49	784

A tax that has been imposed after the law which authorized it has been repealed, is void and of no effect.

APPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J. S. Belden*, Attorney General, for the tax collector, plaintiff and appellant. *G. Spencer Mayo*, for defendants and appellee.

LUDELING, C. J. The tax collector of Concordia parish instituted this suit in 1870 to enforce the collection of a specific tax on cotton raised in 1868, which he alleges was imposed by the act No. 55 of the Legislature of 1865, and which was assessed on the roll of 1869.

The act of 1865, referred to, was repealed and superseded by the revenue bill of 1868, and it was itself superseded by the act of 1869. Neither of these acts imposed the tax claimed. The judge *a quo* correctly rejected the demand.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

No. 2673.—CRANE, BREED & Co. v. J. W. QUINN, Constable—WILLIAM PHILLIPS, Warrantor.

The order of a constable of a justice's court, permitting a party to take possession of property which he holds under a writ of sequestration, is null and void, because the constable, as such, is vested with no judicial power whatever. Therefore if the constable deliver to another the possession of property in his hands under a writ of sequestration, without an order from the justice who issued the writ, he is liable to the owner for the value thereof. In a suit by the owner to recover the value of property which has been illegally parted with, the constable can not be permitted to discharge his liability by returning it. He can only do so by paying its value.

APPEAL from the Seventh District Court, parish of Orleans. *Cotlens, J. H. D. Ogden*, for plaintiffs and appellees. *Wenck & Huft*, for defendants and appellants.

HOWELL, J. Plaintiffs claim of J. W. Quinn, Constable of the Second Justice's Court, parish of Orleans, the sum of \$800, as the value of a hearse. The constable answers that he delivered said hearse, on a release bond, to one William Phillips, who had caused the same to be sequestered in the suit of William Phillips v. Bleakley & Thompson, in said justice's court, and called said Phillips in warranty, who for answer admits having the hearse sequestered, and sets up title thereto by purchase from one J. M. Winslow.

Judgment was rendered in favor of plaintiffs against the defendant for \$700, and in favor of the latter against the warrantor for the same amount, reserving to defendant and warrantor the right to satisfy this judgment by delivering the hearse to plaintiff, and reserving to plaintiff his right of action for damages.

Defendant and warrantor appeal, and in their answer plaintiffs ask that the judgment be amended by striking out that part reserving to the defendant and warrantor the right of satisfying the judgment by delivery of the hearse.

The material facts are the following: Winslow, an undertaker, placed the hearse in the shop of Bleakley & Thompson for repairs. While there he gave an order on them to deliver it to and hold for account of plaintiffs, on their paying the charges. Bleakley & Thompson gave plaintiffs a receipt for it. Shortly afterwards, William Phillips instituted suit for it in the Second Justice's Court against Bleakley & Thompson, and caused it to be sequestered and taken into possession by the constable. Three days thereafter the suit was discontinued by Phillips. Plaintiffs then obtained an order from Bleakley & Thompson on the constable for the hearse. This order was presented to both the constable and Phillips without success. The latter, in support of his claim, introduced in evidence a notarial act of sale (dated anterior to the sale to plaintiffs), from Winslow to himself, of "the contents and stock in trade of the stables and undertaker's establishment, now carried on by said John M. Winslow at No. 101 Rampart street," consisting of horses, vehicles, harness, coffins, lumber, furniture, fixtures,

Crane, Breed & Co. v. Quinn, Constable—Phillips, Warrantor.

good will, cistern, etc., of said establishment, including, we may consider proven, the hearse in question. But it is shown to our satisfaction, as it was to that of the district judge, that if this was intended as a sale, no legal delivery was made, for the vendor continued the business at the same place as before, resorting to the formality of sending some of the property, described in the notarial act, to the stables of the alleged or pretended vendee in another part of the city, and bringing them back again to be used by himself, and hence no sale as to third persons was effected. The bond of release, set up by the constable, was executed several days after the suit was dismissed in the justice's court, and is totally without legal effect. The delivery by him to Phillips was consequently not a legal delivery, and having taken official possession of the hearse, he was responsible for it to the owner. A constable not being vested with judicial powers, has no authority to take property from one party and deliver it to another upon his own motion. He is but the ministerial officer of the court, by whose orders he must be controlled in his official acts.

The judge *a quo* was right in giving judgment against the constable for the value of the hearse taken into his possession by virtue of the writ of sequestration, but erred in giving him the right to satisfy the judgment by returning the property, as plaintiff sued only for its value, exercising the choice of two actions.

It is therefore ordered that the judgment appealed from be amended by striking out that part reserving to defendant and warrantor the right of said judgment, by delivering to plaintiff the hearse referred to in the petition, and that in other respects said judgment be affirmed with costs

No. 2308.—M. W. DEAN v. HENRY FRELLSEN.

A party who brings suit for the damages resulting from the non-fulfillment of an obligation on the part of the other party, must show under the general issue that he has complied with all the conditions imposed upon himself by the obligation, before he can be heard to urge the acts of violation of the obligation by the other party as a reason for not putting him in default.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Frederick M. Goodrich and George L. Bright*, for plaintiff and appellant. *P. H. Morgan and H. G. Morgan*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues for \$23,901 50 as damages arising from the alleged non-fulfillment on the part of the defendant of the following obligation: "We, the undersigned, Henry Frellsen, on the first part, and M. W. Dean and J. O. Pearce, on the second, hereby acknowledge to have made the following agreement: Henry Frellsen

Dean v. Frellsen.

sells to M. W. Dean and J. O. Pearce all his claims against Govy Hood, and agrees to subrogate them to all his judgment and mortgage rights for the consideration of thirty-three thousand dollars (\$33,000), which amount M. W. Dean and J. O. Pearce hereby promise to pay to H. Frellsen as follows, viz: Ten thousand dollars within sixty days; the balance of twenty-three thousand dollars in two yearly installments, bearing eight per cent. interest per annum from date, and they agree to secure the above payments to the satisfaction of General Edward Sparrow. It is mutually agreed that the amount due to Govy Hood, out of the proceeds of judicial sale of the G. G. Willson plantation to H. Frellsen, shall be credited on the above judgment against Hood.

H. FRELLSEN.

New Orleans, August 25, 1868."

This obligation the plaintiff alleges the defendant failed to comply with, to his detriment and injury, and he prays judgment in damages against the defendant as before stated.

The answer is a general denial. The defendant admits that having judgment against Govy Hood, of the parish of Carroll, for a large sum of money, he had caused execution to issue thereon, and that the property of Hood was seized to satisfy the judgment; that while the execution was in the hands of the sheriff, did agree to transfer his rights against Hood to Dean and Pearce, on condition that within sixty days from the twenty-fifth of August, 1868, they paid him ten thousand dollars in cash, and secure the payment of the remainder in two equal annual installments, the said Dean and Pearce to secure all these payments according to agreement to the satisfaction of Edward Sparrow, the defendant's attorney, in the parish of Carroll. The defendant avers that the plaintiff and Pearce having entirely failed on their part to comply with the conditions precedent to his obligation to transfer, he was released, and is in no manner bound to the plaintiff for anything.

The defendant had judgment in his favor, and the plaintiff appealed. The plaintiff contends, and aimed to show that the defendant, by transferring his claims to Hood, under an agreement with him, was guilty of an active violation of the contract on his part, which rendered a putting in default by the plaintiff unnecessary.

All the evidence adduced fails to convince us, as it failed to convince the judge *a quo*, that the plaintiff has succeeded in the effort. He certainly failed to comply on his own part, and he has shown no satisfactory reason why it became unnecessary for him to put the defendant in default.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Villere v. Butman.

No. 2733.—E. VILLERE v. B. BUTMAN.

23 515
45 900

It is not necessary for the plaintiff, in answer to the plea of domicile, to show that the defendant has changed his domicile from one parish to another. It is sufficient if he shows that the defendant has a domicile in the parish where suit is brought. If the defendant, by his own acts, has rendered the place of his real domicile equivocal and uncertain, the creditor may, on showing the fact, proceed against him in either parish, at his option.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Muse & Philips*, for plaintiff and appellant. *T. & J. Ellis*, for defendant and appellee.

HOWELL, J. The defendant having been sued as a resident of the parish of Tangipahoa, excepted to the jurisdiction of the court, claiming his domicile in the parish of St. Tammany. The exception was maintained and plaintiff appealed.

The evidence sustains the judgment of the court *a qua*. It is shown that the defendant owns a residence in Mandeville, parish of St. Tammany, where he has resided continuously for ten or twelve years, his family never leaving there. He has been engaged in business in St. Helena, now Tangipahoa, since the first or second year of the war. His largest business establishment is in Clinton, East Feliciana, and he is a silent partner in a business in St. Tammany. He gives his personal attention to the business in Tangipahoa, but it appears that he has always retained his domicile in St. Tammany, where he established a home, and no intention is shown of ever changing that domicile. It is true he voted at Tangipahoa in the fall of 1865, but he says that he expressly inquired if doing so would cause him to lose his citizenship in St. Tammany, and was answered, no. During the last year he was solicited by the citizens to accept the offices of justice of the peace and mayor of Mandeville, which he had held about two years before, and served as a juror in St. Tammany at the last term of the district court, prior to the trial of this suit.

We are disposed to rely somewhat upon the district judge's estimate of the testimony on the question of domicile in this case, as, to say the most in behalf of plaintiff, it is conflicting and confused

Judgment affirmed.

ON REHEARING.

TALIAFERRO, J. The substance of the evidence we take to be this: Butman, the defendant, has resided for a number of years in the town of Mandeville, in the parish of St. Tammany, where his family has long been permanently domiciled. He was president of the police jury of that parish and mayor and justice of the peace in the town of Mandeville, but he had been *functus officio* in both cases for two years

Villere v. Butman.

before this suit was brought. The town of Mandeville is shown to be more of a watering place or place of resort in the summer season than a business place. The defendant, as a witness, says: "It has been about three years since I had a business establishment in my own name in the parish of St. Tammany."

The sheriff of the parish of Tangipahoa says the defendant "has been living, eating, drinking, sleeping and carrying on business in this place (Amite City) and Tangipahoa for the last three years. His residence has been continuous for the last six months."

The defendant, in his testimony, says: "I have three business establishments in this State, one in this place (Amite City), one in the town of Tangipahoa, one in East Feliciana; also, am a silent partner in a business in the parish of St. Tammany. I have been engaged in business in the parish of St. Helena, now Tangipahoa, since the first or second year of the war, and I have kept up continuously a business ever since in this parish. I regard that my principal business establishment, that is the greatest amount of capital that I have invested, is in Clinton, parish of East Feliciana, in the coffeehouse business. I spend the most of my time at this place for the present." He states that in 1865 he voted in St. Helena, now Tangipahoa, and that he served as a jurymen in the parish of St. Tammany in 1869. Here, then, is the case of a man who has a family that has lived constantly in the town of Mandeville ten or twelve years, but who is carrying on no business there, it not being a place of trade or business. On the other hand he has been carrying on business at other places for the last seven or eight years, residing continuously in the parish of St. Helena, now Tangipahoa, for three years, being absent from there during that period for not more than ten days at a time, his principal business establishment having been, during three years, in that parish, at a distance of one hundred miles from Mandeville. We find him voting in St. Helena and afterwards acting as a juror in St. Tammany. We see that he has two places of business in Tangipahoa and one in Clinton, and that he is a silent partner in a fourth concern in Covington. The wife, not separated in bed and board from her husband, can have no other domicile than that of her husband; but it by no means follows that the defendant's domicile must necessarily be in St. Tammany because his wife resides in that parish and has never resided in Tangipahoa. "The principal establishment is that in which a person makes his habitual residence; if he resides alternately in several places and nearly as much in one as in another, and has not declared his intention in the manner hereinafter prescribed, any one of the said places where he resides may be considered as his principal establishment, at the option of the persons whose interests are thereby affected." C. C. 38 [42].

Villere v. Butman.

It is well established that the defendant resides more in the parish of Tangipahoa than he does in the parish of St. Tammany. He has made no written declaration declaring which is the parish of his domicile. Where such a state of facts is presented, as we find in this case, the question is not whether the defendant has changed his domicile from St. Tammany to Tangipahoa, but rather where is his domicile? It is not for the plaintiff to show, according to article 43 [45] Civil Code, from circumstances, that the defendant has changed his domicile at all. It is sufficient, for his purpose, to show, according to article 38 [42], that the defendant resides as much in one of these parishes as the other. He shows, according to that article, that the defendant's habitual residence is in Tangipahoa and that his principal establishment is in that parish. The defendant has not shown by the public declaration required of him which is the place of his domicile. By his own acts he has rendered the place of his real domicile equivocal and uncertain, and failing to remove the doubt by a formal recorded act of notice to the world, his creditor thereby acquires the right of suing him in either parish.

A review of the evidence induces us to conclude that our former judgment should be set aside.

It is therefore ordered that the judgment first rendered in this case be annulled; and it is now ordered that the exception be overruled and the case remanded to the court of the first instance to be proceeded with according to law, the defendant and appellee paying costs of this appeal.

Justices Howell and Wylv adhere to the former opinion.

No. 3225.—GLASSCOCK & MOORE v. WILLIAM WELLS.

A combination of parties during the late war, and after the city of New Orleans had been captured by the United States forces, to carry on trade and commerce between said city and the surrounding country, outside of the United States military lines, was illegal. The courts will not, therefore, give effect to or enforce demands or obligations growing out of such illicit transactions.

A PPEAL from Sixth Judicial District Court, parish of Livingston.
Ellis, J. T. & J. Ellis, for plaintiffs and appellees. *R. H. Marr* and *Julius E. Wilson*, for defendant and appellant.

This case was tried by a jury in the court below.

Howe, J. This was an action to recover \$7828 20, alleged to be due for cotton sold and delivered in 1863. The answer was a general denial and a plea in reconvention for \$15,871. The cause was tried by a jury, who rendered a verdict in favor of plaintiffs for \$3500, and from a judgment rendered thereon the defendant has appealed.

The principal point made in this court by the appellant is that the transactions of the parties hereto, out of which the claim arose, were illicit, constituting an unlawful combination on their part to run goods from New Orleans to Madisonville and other places outside the military lines of the United States forces, and to run cotton into New Orleans from such outside points—an agreement for blockade running, inward and outward, the profits on the cotton, the inward cargoes, to belong to one party, and the profits on the goods, the outward cargoes, to belong to the other party.

We are satisfied from the evidence that this position of defendant is correct, and that neither party to this litigation can recover upon the cause of action set up. The fact that both parties resided on the same side of the lines can not change our conclusion, which is, not that the parties were enemies and could not contract with each other, but that, having power to contract, they made an unlawful agreement. 22 An. 216. An agreement the fruits of which we will not undertake to divide.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the verdict set aside. It is further ordered that there be judgment in favor of defendant, with costs

Rehearing refused.

No. 2364.—ANNIE DOLL RICE v. HENRY RICE, her Husband.

In a suit by the wife for a separation from bed and board, coupled with a demand for a moneyed judgment, founded on the allegation that the husband had received and converted to his own use certain funds which she had inherited from the estate of her father and mother, the marriage contract showed that from the date of the marriage the wife retained the administration of her separate estate, and the evidence showed that the funds derived from the succession of her father and mother had been invested in certain property in her name and for her benefit. Held—That under this state of facts, she was not entitled to a moneyed judgment against her husband for moneys alleged to have been received by him.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Cotton & Levy*, for plaintiff and appellant. *A. Cazabat*, for defendant and appellee.

WYLY, J. The plaintiff sues for separation from bed and board, and for judgment against her husband for \$25,000, for paraphernal funds which she inherited from the successions of her father and mother, and which sum of money she alleges has been used and appropriated by the said husband.

The court gave judgment for separation from bed and board, but rejected her demand for a money judgment, on the ground that by the marriage contract there was no community of acquets and gains, that she retained the administration of her separate property, and that the funds derived from the successions of her father and mother were ap-

Annie Doll Rice v. Henry Rice, her Husband.

plied to the purchase and improvement of certain property, in the name and for the benefit of the plaintiff, and that the defendant never used or appropriated her said funds as alleged. From this judgment the plaintiff appeals.

The grounds stated by the court for rejecting the money demand is sustained by the evidence, and there is no controversy as to the correctness of the judgment of separation from bed and board.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 2262.—GADANNE CASANAVE v. PLACIDE J. SPEAR et als.

A possessor of real property under a title at probate sale, applied for a writ of injunction against the heirs who claim the same, on the allegation that he was the owner. On trial of the motion to dissolve the injunction, it was shown that all the formalities had not been observed by the administrator in making the sale of the property, and that the purchaser was not, therefore, in such a case entitled to the writ of injunction.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. H. McCaleb*, for plaintiff and appellant. *Charles Logue*, for defendants and appellees.

HOWE, J. This is a suit which is apparently petitory in its character. The plaintiff, alleging that he acquired the property in dispute by probate sale in the succession of Mathilde Durel, and has been owner and possessor of it for upwards of a year, avers that August Cheval and Leonide Cheval are about to offer the same for sale, through the agency of Placide J. Spear, auctioneer, in violation of petitioner's right of ownership. He prayed for an injunction to restrain these parties from attempting to sell the property, or to take possession thereof, and from disturbing the plaintiff in the quiet ownership thereof; and prayed to be declared by judgment the true and lawful owner of said property.

The Chevals answered by a general denial, and the averment that they were the lawful heirs of Mathilde Durel, and had been put in possession of her succession, and prayed for a dissolution of the injunction granted with damages, etc., and to be quieted in their possession of the lot in dispute.

There was judgment dissolving the injunction and "reserving plaintiff's rights to sue in the Second District Court," and the plaintiff alone appealed. The only question, therefore, before us, is the propriety of the decree dissolving the injunction.

The suit is rather anomalous. The plaintiff alleges himself to be in possession of the lot in question, and the evidence shows he has been so for more than ten years, paying taxes and receiving rents. His right to bring a petitory action might well be doubted. Again, he asks no damages as for slander of title, or for any other reason, and

Casanave v. Spear et als.

it is questionable if an injunction should issue to restrain such acts as he details. But taking his suit as petitory (C. P. 54), since he claims the ownership, he fails on the merits to make out a case.

The Chevals appear as heirs of Mathilde Durel, placed in possession of the property of her succession. He does not show that the title of the succession has been legally divested. It appears that his father, P. Casanave, applied to be appointed administrator of Mathilde Durel, and his application was granted, upon his giving bond. He never gave bond, and no letters were ever issued to him. A sale of the property being directed to be made in the same order, it was sold, and the administrator bought it, took possession of it, and paid the price for it, for the plaintiff, his son. We do not think the court *a qua* erred in dissolving an injunction sued out by a plaintiff whose title exhibits such grave defects.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

HOWE, J. It now appears that Pierre Casanave gave a bond. It was not copied in the record, and the assertion in the brief of appellees that he had never given one was not contradicted. But a copy of the bond was attached to the record by consent, in such way that it was overlooked. We are not disposed, however, to change our decree. The supposed want of a bond was but one of the defects referred to.

The prescriptions of five and ten years pleaded by plaintiff, do not apply. The former is intended to cure informalities, and the latter is based on good faith.

Rehearing refused.

No. 2359.—EUGENE GAUDOUZ v. MISS MARIE LOUISE LAURE BLANQUE.

Before executory process can be issued on notes executed by an agent, authentic evidence of the agency must be shown.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Paul E. Laresche*, for plaintiff and appellee. *Edmond Meunier*, for defendant and appellant.

LUDELING, C. J. This is an appeal from an order of seizure and sale. The only question for decision is, was there sufficient authentic evidence to authorize the fiat? We think not. The act of mortgage and notes purport to be executed by Charles de Hault de Lassus as agent of Miss Blanque. There is no proof of this agency in the record: 12 R. 238, *Dosson, curator v. Sanders*; 1 R. 407; 2 An. 491.

It is therefore adjudged that the order of seizure and sale be annulled, and that the appellee pay costs of this appeal.

No. 3332.—THE NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY v. CAMILLE ZERINGUE.

In case of a railroad company that has obtained a right of way through the domain of the State, and the authority is given the company to force the alienation of such private property as may lie on the line or route of the road, and is required for the uses and location thereof, a scrupulous regard to the ascertainment of a just and full valuation of the property to be taken from the owner, and the compensation to be given him, must be observed. If, therefore, as in the present case, one set of commissioners have made a report of the value of the property, which was set aside by the judge *a quo*, at the request of the company, and another has been appointed, who, after taking further testimony, have made a second report, reducing the value of the property to be taken below one-half that placed upon it by the first set of commissioners, which latter estimate is approved by the judge *a quo*, the Supreme Court will, on appeal, in the exercise of their discretionary powers in such cases, remand the cause to the court of the first instance, with instructions that a new commission be appointed, and the case be in other respects proceeded with according to law.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. John H. Ilsley, Jr., and Fellows & Mills*, for plaintiffs and appellees. *H. D. Ogden and E. Bermudez*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs, under the act of the Legislature of this State, approved August 19, 1868, entitled "An act relative to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy its corporate powers and franchises in the State of Louisiana," filed a petition in May, 1870, in the District Court of the Second Judicial District, sitting in and for the parish of Jefferson, setting forth that it is absolutely and essentially necessary for the company to obtain, as auxiliary and ancillary in the prosecution of their work, the quantity of one hundred and ninety-two acres of land, constituting a part of the plantation of the defendant, lying on the right bank of the Mississippi river, about — miles above the city of New Orleans. That the railroad now being built under the authority of the State of Louisiana, granted by the act referred to, is to traverse and pass through the plantation of the defendant, and that for the purposes of wharves, depots, turnouts and other purposes, the specified quantity of land is needed; that the company have used in vain all amicable means to purchase at a fair and reasonable price from the defendant the quantity of land so required, an accurate survey of which they had made, and a diagram of which was filed with their petition. The petition closes with the prayer that the defendant have due notice, and that, contradictorily with the petitioners, the court render an order, in conformity with the provisions of the fifth section of the act referred to, appointing three competent and disinterested freeholders to ascertain and appraise the compensation to be made to the defendant for that portion of his land which it is necessary to expropriate for the purposes expressed.

The New Orleans, Mobile and Chattanooga Railroad Company v. Zeringue.

The preliminary notices having been given, the judge of the district court rendered an order appointing three freeholders as commissioners, for the purposes expressed in the fifth, sixth and seventh sections of the act granting franchises to the company within the State of Louisiana. The commissioners thus appointed were duly sworn, and proceeded to the discharge of their duties. They met on the nineteenth, twenty-fourth and thirty-first days of May, 1870, and received the testimony of a number of witnesses, introduced by the parties, relative to the question of compensation. On the second June they made out their report. Two of the three agreed upon the sum of \$50,000; the other fixed the compensation at \$37,000. It seems that on the presentation of this report, the court, at the instance of the plaintiffs' counsel, dismissed the proceedings without prejudicing the plaintiffs' right to renew them. They were shortly afterwards renewed. Three other commissioners were appointed, and met in pursuance of the order rendered. A mass of testimony was again taken; many of the witnesses who were previously called were re-examined, and the testimony taken before the first set of commissioners was introduced in evidence before their successors. The result was a report fixing the value of the compensation to the defendant at \$18,000.

An opposition was filed on the part of the defendant to the confirmation of this report, and afterwards an amended opposition was presented. Various grounds are set up in these oppositions. It is alleged that the act of August 19, 1868, is unconstitutional, as being in violation of articles 73 and 94, State Constitution. Many reasons are offered to show that the damages and loss to the defendant by the appropriation of so large a portion of his front lands, would greatly exceed the estimated compensation; that the commissioners erred in their appreciation of the evidence given before them, and that since the testimony was closed before the Board of Commissioners, the opponent had discovered new and important evidence, not within his means of knowing previously. A formal affidavit in support of the last ground of opposition was filed. The opponent prayed that the case might be reopened before the same or other commissioners to be appointed by the court.

Judgment was rendered overruling the opposition and confirming the report of the commissioners, and the defendant appealed.

After examining attentively the mass of evidence appearing in the record before us, we are not satisfied that the judge *a quo* was correct in rendering the judgment appealed from. The discrepancy between the estimates of the two sets of commissioners, all of whom we conclude were well selected with reference to their capacity for the business, is very striking. In such a case we think it probable there is error, and in matters of forced alienations there should be scrupu-

The New Orleans, Mobile and Chattanooga Railroad Company v. Zeringue.

lous regard to the ascertainment of a just and full valuation of the property to be taken from the owner, and the compensation to be made to him, after a due consideration of all the elements entering into such estimates. We think the subject should undergo further examination.

To this end, it is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance, with instructions to submit it again to three commissioners to be appointed by him, in order that the same may be reopened, and the parties allowed to introduce further evidence, and the case to be further proceeded with according to law; the plaintiffs and appellees paying costs of this appeal.

Nos. 3345 and 2225.—A. B. JAMES & Co. v. FELLOWES & Co.—JOSEPH HERNANDEZ, Surety, etc.

The voluntary payment of a judgment or a portion thereof, destroys the right of appeal. If it appear that the judgment appealed from has been declared an absolute nullity by the court *a qua* on account of its having been rendered and signed in vacation, the appeal will be dismissed *ex officio*. 21 An. 306.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. P. H. Morgan and W. H. Hunt*, for plaintiffs and appellants. *Cooley & Phillips and C. Bemiss*, for defendants and appellees.

HOWE, J. This cause was remanded to the lower court on the twenty-third January, 1871, to ascertain as matter of fact whether the appellant, Joseph Hernandez, had, prior to taking his appeal, acquiesced in the judgment by paying it in whole or in part.

It now comes back to us with the evidence on this question, and from the testimony there is no doubt that the appellant did voluntarily pay the sum of \$7000 on the judgment some time before he took his appeal. The fact that the party for whom he had been surety furnished him the means to make this payment, can not change this conclusion. But his counsel now contend that the judgment appealed from was an absolute nullity, and has been so declared, because it was rendered and signed in vacation, and therefore that acquiescence in it was impossible.

The judgment having been declared an absolute nullity, because rendered and signed in vacation, it becomes our duty to dismiss the appeal therefrom, *ex officio*, on the authority of *Culver v. Leovy*, 21 An. 306.

We have two records before us in this matter; the one No. 2225, in which J. Hernandez is appellant from the judgment on which the payment was made; the other No. 3345, in which the plaintiffs, as

James & Co. v. Fellowes & Co.—Hernandez, Surety, etc.

appellants from the later decision of the judge *a quo* upon the question of payment, bring up the testimony on that point.

In the case No. 3345, it is ordered that the judgment appealed from by plaintiffs be avoided and annulled; and in case No. 2225, it is ordered that the appeal taken by Joseph Hernandez be dismissed; and it is further ordered that he pay the costs of both appeals.

No. 2371.—MRS. GEORGE WAILES *v.* THE CITIZENS' BANK OF LOUISIANA.

The wife who, in payment or part payment of her judgment against her husband, received a transfer of a claim which he alleges to be due him, acquires only such rights thereto as the husband had. A debtor who allows his property to be sold under execution and the proceeds to be applied in satisfaction of the writ, is thereby concluded from his right of action to recover the proceeds of the sale on the ground that the consideration of the debt, to pay which the property was sold, was illegal. Therefore, in this case, the wife being the transferee of the husband's claim to the proceeds of the sale of his property to pay a debt against him, on the ground that the consideration of the debt was the sale of slaves: Held—That, inasmuch as the husband had made no opposition to the sale and application of the proceeds to the payment of his debt, he was barred from afterward setting up a claim thereto, and the wife, being his transferee, could only exercise such rights as her transferrer had conferred upon her, and that she could not, therefore, recover.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. Filleul*, for plaintiff and appellant. *Armand Pitot*, for defendants and appellees.

WYLY, J. In part payment of her judgment against her husband, George Wailes, the plaintiff received the transfer of the claim on which this suit is founded.

In 1853 the Citizens' Bank sold a sugar plantation and fifty-one slaves in the parish of St. Charles to Charles Roussel and others for \$80,000. The purchasers furnished a stock note, with the ordinary obligations assumed by the stockholders of the bank, for the sum of \$32,300, and for the balance of the price, amounting to \$47,700, they furnished a number of notes which have since been paid.

In 1859 these purchasers sold this property to Parker Campbell, who assumed the stock note due the bank, with all the accessory obligations, the note then being reduced to \$23,240.

In 1860 Campbell sold the plantation and slaves and bank stock to George Wailes, the husband of the plaintiff, who assumed the payment of said stock note, with the same obligations, and received his vendor's subrogation to all his rights against the previous vendors, the said stock note being then reduced to \$21,850.

In 1867 the bank foreclosed its mortgage against the said George Wailes and purchased the mortgaged property (except the slaves, which were emancipated), crediting its writ of sale with the price at which the property was adjudicated to it.

Mrs. George Wailes v. The Citizens' Bank of Louisiana.

In November, 1868, the plaintiff, the transferee of her husband, brought this suit to recover the proceeds of the sale of his plantation from the bank, who purchased it and retained the said proceeds in satisfaction of the balance due on said writ, on the ground that at the time the order of seizure and sale was executed against said property, the said debt was not valid and obligatory in consequence of the emancipation of slaves, the greater part of the consideration of the note on which the mortgage was foreclosed being for slaves, and the bank, the purchaser, ought not to retain the price of adjudication, to wit: \$30,000, in discharge of the writ under which the sale was made, because of the said invalidity of the debt on which the executory proceeding was founded.

The court gave judgment for the defendant and the plaintiff has appealed.

It seems very clear that the plaintiff has no greater rights than her husband, her transferrer, had. And it is equally clear that a debtor can not recover the proceeds of the sale of his property after they have been applied to the satisfaction of the writ under which it was sold, because he has a good defense to the suit or because of the invalidity of the consideration of the note on which the judgment was founded, there having been no opposition to the sale.

Having acquiesced in the execution of a judgment the debtor will not be heard claiming its invalidity. The husband of the plaintiff having made no opposition to the enforcement of the mortgage and the application of the proceeds of the sale to the writ, had no action for the repetition of the price; the writ of sale having been discharged, it is too late to inquire into the validity of the consideration of the note on which the order of seizure and sale was granted.

The plaintiff suing as the transferee of her husband can only assert such rights as she received in the transfer, and as he had no right of action against the defendant, she acquired none.

Let the judgment appealed from be affirmed, with costs.

Rehearing refused.

No. 3007.—STATE OF LOUISIANA v. JOHN EVANS.

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The judgment of the court below in a criminal case will not be reversed on appeal, if it appear that the judge *a quo* has assessed a smaller fine on the accused than he was authorized by law to impose.

APPEAL from the Sixth Judicial District Court, parish of Tangipahoa. *Ellis, J. Bolivar Edwards*, District Attorney, for the State. *Thomas Green Davidson*, for defendant and appellant.

HOWE, J. We have no jurisdiction in this case, which is criminal in its character, save of questions of law. Constitution, art. 74.

State of Louisiana v. Evans.

The only question of law presented, in the opinion of this court, is by the point raised by counsel that the fine imposed is too small. The sum embezzled was found to be \$383 05, and under the statute the fine might have been imposed to the extent of double this sum, or \$766 10. The judge *a quo*, perhaps by error of addition, made the fine \$666 10. We do not think the defendant has any just cause to complain that he has been saddled with a smaller fine than might legally have been imposed.

Judgment affirmed.

Rehearing refused.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

JUNE, 1871.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. W. W. HOWE,

} *Associate Justices.*

No. 753.—SUCCESSION OF J. SOSTHENE MOUTON.

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A judgment homologating an administrator's account so far as not opposed, becomes final if not appealed from within the delays allowed by law. If, therefore, an appeal has been taken from a judgment rendered on the items of the account which have been opposed, after the time has elapsed for taking an appeal from the judgment on the items not opposed, the appellate court can not inquire into the correctness of the judgment on the items not opposed, because the judgment has become final.

A PPEAL from the Parish Court, of Lafayette. *Moss*, Parish Judge. *Felix Voorhies*, for estate. *De Blanc & Perry*, for opponent and appellant.

HOWELL, J. On the twenty-seventh of November, 1867, the administrator of this succession filed a tableau of distribution, with an acceptance of service by certain parties entitled to special notice, and caused publication to be made. On the twenty-eighth of December, following, the widow opposed its homologation, on the grounds that she was charged with receiving \$1600 more than she had actually received, and had not been allowed the sum of \$3000, amount of purchases by her husband at the sale of her mother's estate, and \$5000, being the half of individual debts of the decedent, due by him prior to, and paid after marriage.

On the seventh of March, 1868, the tableau was homologated, so far as not opposed. From the judgment rendered on the twelfth of July, 1870, rejecting the opposition of the widow, she and J. Edmond Mouton, have appealed. In this court they have filed a plea of prescription to every claim, account and note on the tableau, except those in favor of the widow. This plea can not avail, as the judgment of seventh March, 1868, homologating the tableau as to those items, and the whole tableau so far as not opposed, is not before us for revision.

The appellants, in their brief, complain only of this judgment of homologation, but it is manifest that we can not inquire into its correctness, on an appeal, taken more than two years after its rendition from a judgment dismissing a specific opposition, not embraced in or connected with the said judgment of homologation.

The alleged fact that one of the appellants attained the age of majority after the filing, but before the homologation of the tableau, can not give him the right to oppose the tableau after it is homologated, or to have the judgment of homologation not appealed from revised on this appeal, nor can the clause of the prayer in the opposition of the widow, "that the homologation of the said tableau of J. Sosthene Mouton be suspended until the decision of the court," give any such rights to the appellants, or either of them. That judgment, so far as this controversy is concerned, is final. The parties aggrieved by it might have applied for a new trial, taken an appeal from it, or instituted an action to annul it if the causes of complaint were sufficient.

The rulings of the judge *a quo* refusing to entertain the amended opposition of the widow, and the opposition of J. Edmond Mouton, seem to us to be entirely correct, and we can find no good reason for disturbing the judgment appealed from.

Judgment affirmed.

No. 746.—MARTIAL SORREL *v.* DENIS CARLIN, et al.

A party who brings suit against another for cutting and removing timber from his land must show—first, that he is the owner or proprietor of the land, and—secondly, that a certain specific number of trees have been taken from his premises, failing in which he can not be permitted to recover.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Oliver & Dumartrait*, and *Deblanc & Perry*, for plaintiff and appellee. *Tucker & Davis*, and *R. N. McMillan*, for defendants and appellants.

TALIAFERRO, J. The defendants are charged by plaintiff with having felled upon his land four hundred and thirty-seven cypress trees, and removed them without his permission; that defendants have by their gross violation of his rights, in cutting and removing this timber, caused him damages to the amount of five thousand dollars. He

 Serrel v. Carlin et al.

caused the timber to be sequestered, and prays to be decreed the owner of it, and for judgment *in solido* against the defendants for five thousand dollars, as damages for their illegal and wrongful acts. The answer is a general denial, and the defendants set up a reconventional demand of five thousand dollars as damages caused them by plaintiff's seizing and taking their property out of their possession, and for being deprived of the use of it, and having to incur expense in the employment of counsel to protect their rights, etc. Judgment was rendered in favor of the plaintiff, sustaining the sequestration, and decreeing the plaintiff owner of the timber in controversy, rejecting the reconventional demands of the parties for damages.

This case presents mainly questions of fact. We do not concur with the judge *a quo* in the view he seems to have taken of the evidence. We do not consider that the plaintiff has made out a case that warrants a judgment in his favor. Assuming that he has shown that some of the trees were taken from his land, the plaintiff sought to establish that the defendants owned no lands in the vicinity from whence the timber was obtained, and thereby to establish that they were trespassers against somebody, and that against them, the maxim *contra spoliatores omnia præsumentur* might be invoked. The evidence was properly rejected. If the defendants owned no lands from which the trees were taken and they were obtained from lands belonging to persons other than the plaintiff, he would have no right to reclaim them. It was for him to make it clear beyond a reasonable doubt that all the trees, or some specific number of them, were illegally taken from his premises, failing in which the judgment should have been rendered in favor of defendants.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that judgment be, and the same is hereby rendered in favor of the defendants, the plaintiff and appellee paying costs in both courts.

No. 752.—ALEXANDER LATIOLAIS v. LOUIS V. MOUTON.

The proces verbal of a surveyor appointed as an expert to determine a boundary line, if not authenticated, is nothing more than a memorandum, and is not therefore admissible in evidence as an authentic document on the trial of an action of boundary.

APPEAL from the Fifteenth Judicial District Court, parish of Lafayette. *M. O. Crow*, Judge *ad hoc*. *M. E. Girard*, for plaintiff and appellee. *Ed. E. Mouton*, for defendant and appellant.

Howe, J. This is an action of boundary; to which there is no prescription. 21 An. 673; C. C. 825.

Upon the trial of this case the defendant reserved a bill of exceptions to the reception of a document offered by the plaintiff as a *pro-*

ces verbal of the surveyor, appointed as an expert, to determine provisionally a boundary line.

In our opinion the objection should have been sustained, and the paper excluded. The surveyor himself was not called. The paper was offered as authentic, to make full proof of itself. In order to do this it should have been made according to the formalities prescribed by article 833 [829] of the Civil Code, and signed by two witnesses called for the purpose; or contain a mention of the causes which prevent them from signing. In the absence of these formalities it is a mere memorandum which might have been produced and referred to by its maker on the witness stand, but which can not make full proof of itself. 4 An. 33, 382; 5 An. 122; 13 An. 128; C. C. 841, 833.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded for a new trial, and that appellee pay the costs of appeal.

TALIAFERRO, J. *dissenting*. The article 841 [835] in pursuance of which the preliminary inspection by the surveyor was made, and his report returned to the court to enable it to determine in what manner the judgment on the question of boundary should be finally rendered, does not require that the return, or report of the surveyor shall be signed by witnesses, or to be clothed with any of the formalities required by the articles 833, 834, 835, 836 and 837, which apply only when the ulterior and final survey and establishment of the boundary is made by measurement and the placing of permanent landmarks, which can only be done after the decree has been rendered, and in conformity with it. The exception I think should have been overruled.

No. 737.—JAMES G. PARKERSON v. JAMES M. GRUNDY et al.

In the examination of an appeal taken from an order of seizure and sale the appellate court can only determine whether the evidence presented to the judge *a quo* is sufficient to authorize the fiat.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. J. Olivier*, for plaintiff and appellee. *D. Caffery*, for defendants and appellants.

LUDELING, C. J. This is an appeal from an order of seizure and sale.

It has been settled by repeated decisions that the only question which can be examined on appeal, in such a case, is, whether or not the evidence before the judge would authorize the fiat.

In the case at bar the authentic act of mortgage and the note, annexed to the petition, fully authorized the order of seizure and sale.

It is therefore ordered that the judgment be affirmed and that the appellants pay the costs of this appeal.

Pavy v. Elizabeth Escoubas, Administratrix.

No. 743.—P. J. PAVY v. ELIZABETH ESCOUBAS, Administratrix.

28	531
111	364

Proving that a debtor paid a sum credited on his note on the day and date that the credit is made on the note, is tantamount to proving an acknowledgment of the debt. Parol evidence to establish such credit is, therefore, inadmissible after the maker of the note has died and payment is sought to be enforced against his succession. 21 An. 300.

28	531
111	364
125	290
125	291

APPEAL from the Eighth Judicial District Court, parish of Calcasieu. *King, J. George H. Wells*, for plaintiff and appellee. *Louis Leveque*, for defendant and appellant.

TALIAFERRO, J. The defendant, in her capacity of administratrix of the estate of her deceased husband, is sued upon a promissory note executed by him on the tenth of March, 1862, in favor of Lobit, Charpentier & Co. or their order for \$3183 61, made payable on the fifteenth of March, 1863, and stipulating the payment of interest at eight per cent. per annum from maturity until paid. On the fourteenth of April, 1860, the maker of this note mortgaged several tracts of land lying in the parish of Assumption to secure the payees of the note against loss or liability they might incur from advances, acceptances and indorsements to be made by them for the benefit and accommodation of Escoubas, not at any time to exceed the sum of \$10,000 on the whole. The act of mortgage declares that it is to inure to the benefit of any future holder of the obligations to be accepted or indorsed by Lobit & Charpentier, contains the pact *de non alienando* and stipulates the payment by the mortgageor of attorney's fees, if any should be incurred in the enforcement of the agreement entered into between the parties. The note sued upon was transferred by the payees to the plaintiff, who brings this action. Two credits are indorsed on the note, one dated July 18, 1866, for \$1500, the other dated June 21, 1867, for \$872 31.

The defendant filed the plea of prescription, and afterwards an answer containing a general denial. Judgment was rendered in the court below in favor of the plaintiff for the remainder due on the note, after deducting the credits, with recognition of the mortgage, and decreeing its enforcement against the mortgaged property, and awarding likewise in favor of the plaintiff five per cent. of the amount of the judgment for attorney's fees.

From this judgment the defendant has appealed.

There are several grounds of defense taken, but we deem it unnecessary to examine more than one, that of prescription. It is contended on the part of the plaintiff that the act of 1858, excluding, in cases of deceased persons, parol evidence to establish an acknowledgment or promise to pay a debt or liability in order to take such debt or liability out of prescription, has no application to this case, inasmuch as the evidence introduced was to prove simply the fact that the maker of the note paid on it the amounts credited and thus establish an inter-

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ruption of prescription, and that this is not proving by parol a promise to pay a debt or liability according to the intendment of the act of 1858. When the maker of a note pays a part of its amount we think he impliedly admits the existence of a debt and his obligation to pay it. Proving, therefore, that a debtor paid a sum credited upon his note is, in substance, proving this implied admission or acknowledgment of a debt, and a party is not permitted to prove by parol an acknowledgment of a debt by a person since deceased. We expressed this view in the matter of the succession of Hildebrandt, 21 An. 350, a case presenting the same question that arises in the one now before us.

We think the exception should have been sustained and judgment given in favor of the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

No. 744.—JEAN CARRERE v. AUGUSTIN LABAU and J. N. WEBSTER.

A principal who sues his agent for a balance alleged to be due him, and also makes a third party a party to the suit, on the allegation that certain notes which had been purchased by his agent with funds intrusted to the agent, and by him transferred to said third party, must show as matter of fact, before he can recover the notes of such third party, that the notes were purchased by the authority of his principal with his funds, and also that the third purchaser of the notes from the agent knew the fact at the time of the transfer.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. A. C. Dumartrait and Frederick Gates*, for plaintiff and appellant. *Tucker & Davis*, for defendants and appellees.

HOWE, J. The plaintiff instituted this action against the defendant, Labau, as his agent, claiming from him a balance of \$32,608, subject to such credits as the agent might establish. He further alleged that certain notes in possession of the defendant Webster were his (the plaintiff's) property, having been purchased by Labau with the funds intrusted to him by plaintiff, and transferred to Webster in fraud of plaintiff's rights, and he caused these notes to be sequestered.

There was judgment dismissing the plaintiff's action, and he has appealed.

First—The evidence does not establish the plaintiff's ownership of the sequestered notes. It is not necessary to decide what might be the legal conclusion, if the testimony showed that the defendant Labau purchased the notes with plaintiff's funds, and then transferred them collusively to Webster. It suffices to say that such a state of facts is not proved. The notes were originally the property of Bel-

Carrere v. Labau and Webster.

locq, Noblom & Co., and were transferred by them to Webster in payment of a draft drawn in favor of the latter by Labau. It does not appear that the funds against which Labau drew were the plaintiff's, and he therefore has no interest in this suit to contest the validity of Webster's title. The court *a qua* did not err in dismissing the sequestration and the demand as to Webster.

Second—It amply appears, however, from the record, and particularly from the letters of Labau, that he was, up to 1866, the agent of plaintiff; that his account is still unsettled, and that the plaintiff is entitled, under the former portion of the prayer of the petition, to judgment against the succession of Labau (who has died since the institution of this suit) for a balance of some kind. This branch of the cause should be remanded for more particular proof.

It is therefore ordered that the judgment appealed from, so far as it dismisses the writ of sequestration, and the suit of plaintiff, as against the defendant Webster be affirmed; and that in so far as it dismisses the action as against the succession of Labau, it be reversed; and that the cause as against the said succession be remanded, to be further proceeded with according to law. Costs of appeal to be paid by the succession.

No. 751.—SUCCESSION OF EDWARD SIMON, SR.—Opposition of ABAT et als. to Tableau of Distribution and Classification.

23	533
125	165

The recording of the certificate of the notary who drew the act of mortgage, in the office of the recorder of mortgages of the parish where the property is situated, is not sufficient to give effect to the mortgage as against third persons. C. C. 3336; acts of 1855, No. 274, p. 335.

A certified copy of the act of mortgage must itself be placed of record in the parish where the property is situated to give it effect. This rule does not apply to the parish of Orleans, the registry of mortgages in this parish being governed by special laws on the subject. Acts of 1855, No. 285.

A PPEAL from the Third Judicial District Court, parish of St. Martin. *E. Monge*, attorney at law, Judge *ad hoc*. *Fenlin Voorhies*, for opponents and appellants. *Jos. A. Breaux* and *A. C. Dumartrait*, for appellees.

LUDELING, C. J. The administrator of the succession having filed his account and tableaux of distribution, Valcourt Abat and others opposed the claim of Lobit, Charpentier & Co., on the grounds that the mortgage in their favor was never legally registered; that they are not creditors for the amount placed on the tableau, and that the drafts of the deceased were paid by Lobit, Charpentier & Co. in Confederate currency.

There was judgment dismissing the opposition, and the opponents have appealed.

It appears that in 1861, Lobit, Charpentier & Co. made advances to Edward Simon, Sr., and to secure the payment of the sums advanced, said Simon specially mortgaged certain property situated in the parish of St. Martin, by an act passed before Selim Wagner, a notary public in the city of New Orleans, and that in lieu of the act of mortgage, a certificate of said Selim Wagner was registered in the recorder's office of the parish of St. Martin, which certificate stated that on the eighth day of February, 1861, Edward Simon, of the parish of St. Martin, in this State, had mortgaged in favor of Lobit, Charpentier & Co., of New Orleans, "a plantation or tract of land situated in the parish of St. Martin, at the distance of about two miles from Breaux's Bridge, containing ten arpents in front on the east side of the river Teche, by eighty arpents in depth, bounded above by a tract of land formerly belonging to Raphael Cormier, and below by a tract formerly belonging to Widow Alexander Guilbeau, which plantation is the same formerly owned by David Rees, and also the other property and slaves fully described and named in said act," etc. Then follow the names of the slaves, which the notary certifies were mortgaged, "together with a certain plantation and certain lands fully described in said act of mortgage." And the notary further certifies what debts the said mortgage was given to secure.

This is the only registry of the mortgage made in the parish where the property mortgaged was situated.

The syndic of Lobit, Charpentier & Co., and the administrator of the succession, contend that this is a sufficient registry to affect the rights of third persons.

We think otherwise. Article 3342 declares that "conventional mortgage is acquired only by consent of the parties; and judicial and legal mortgages only by the effect of a judgment or by operation of law. But these mortgages are only allowed to prejudice third persons when they have been publicly inscribed on the records kept for that purpose, and in the manner hereinafter directed." Article 3345 declares all mortgages are "required to be recorded in the manner hereafter provided." And article 3336 declares that "to obtain an inscription of a public act, or judgment, the creditor, either in person or by an agent, shall present an authentic copy of the act or judgment to be recorded, to the register of mortgages of the place where the inscription is to be made." And the statute of 1855, No. 274, section 1, declares that "no notarial act, concerning immovable property, shall have any effect against third persons, until the same shall have been recorded in the office of the parish recorder where such immovable is situated," and section 2 declares "all sales, contracts and judgments which shall not be so recorded shall be utterly null and void, except between the parties thereto," etc. P. 335. It seems clear, therefore,

Succession of Simon, Sr.

that the public act creating the conventional mortgage and the judgment from which spring the judicial mortgage, must be registered in the manner indicated by the law maker, in order to affect the rights of third parties. So far as third persons are concerned, it is the registry alone which gives validity to the conventional and judicial mortgages alike. Article 3366 provides the same mode for effecting the inscription of both. If the registry of a certificate of the notary as to the contents of an act of mortgage be sufficient to affect third persons, why may not a clerk's certificate as to the substance of a judgment be substituted in lieu of the judgment for registry also?

Mortgages, like privileges, are the creatures of the law, so far as third persons are concerned, and creditors who claim a preference over other creditors must comply strictly with the law, which confers this preference only on condition that its terms are observed. 4 Rob. p. 7, case of Falconer; 21 An. 427; 22 An. 402.

The law relied on by the syndic and administrator, No. 285 of the session acts of 1855, relates only to the parish of Orleans, and is wholly inapplicable to a case like this.

It is therefore ordered and adjudged that the judgment of the lower court, dismissing the opposition, be avoided and reversed, and that there be judgment amending the tableau in such a manner as to give a preference to the judicial mortgage of the opponents over the claim of Lobit, Charpentier & Co., and that in other respects the judgment be affirmed. It is further ordered that the costs of this appeal be paid by the appellees.

No. 3429.—JOHN M. HOYLE *v.* NEW ORLEANS CITY RAILROAD COMPANY.

A railroad company in the city of New Orleans which has been authorized by the city to change the track of its railroad, can not be enjoined from so doing by an individual property holder situated on the line of the road, on the ground that such change would likely prove detrimental to the public health, and would therefore work an irreparable injury to him.

A party who discloses no interest whatever in an ordinance of the Common Council, can not be permitted to raise the question of its validity with another party who has acquired a right under the ordinance.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. O. T. Bemis*, for plaintiff and appellee. *W. H. Hunt*, for defendant and appellant.

HOWE, J. This case was before this court lately on appeal from a judgment in favor of plaintiff rendered by the Sixth District Court of the parish of Orleans. See 23 An. 502. The cause was remanded that it might be transferred to the Eighth District Court. Having been thus transferred, the judge of the Eighth District Court, following the opinion expressed by the judge of the Sixth, rendered another judg-

ment in favor of plaintiff, enjoining the defendant from constructing a horse railroad track on the edge of the neutral ground in Canal street.

A careful examination of the record fails to disclose any legal reason for this injunction. The plaintiff has filed no brief in this court, and we can only presume that he relies on the following points, which we will notice in the order in which they are set forth in his petition:

It appears that in the middle of the neutral ground in question there is a draining canal; that this draining canal is covered by a platform on which for some years the tracks of the defendant's railway have been laid; that this canal was cleaned out by the authorities of the city of New Orleans, and the earth thus excavated thrown out and leveled down on each side in such a way as to form a bank of some fourteen inches in thickness, encroaching somewhat on the shellroads on either side; that on these banks the defendant proposes to lay its tracks, removing them from over the canal, under a permission given by an ordinance of the Common Council, dated May 3, 1869, and that these banks of earth will, unless properly provided with ditches, prevent in some measure the flow of surface water from the inner edges of the shellroads. The plaintiff, as owner of property on Canal street, claims that he has been greatly injured by the announced intention of the defendant thus to remove the tracks, and that the laying thereof on the newly selected lines will work him an irreparable injury, and hence his claim for a perpetual injunction.

First—The excavation of the draining canal, the throwing up of earth on either side upon the neutral ground, and the possible obstruction of drainage of the shellroads were all the work of the city of New Orleans. The defendant had nothing to do with these acts, and is in no wise responsible for the real or imaginary consequences of them. The city is not a party to this suit, and it is not necessary, therefore, to decide how far the plaintiff might have a right to interfere with its administration of the public highways on which he chooses to buy land. It is enough to say that neither the plans nor performances of the defendant have caused or are likely to cause any injury to the plaintiff which can authorize the stringent remedy of injunction as against it.

Second—The plaintiff alleges that the ordinance under which the defendant proposes to shift the line of its tracks is null and void under the law of 1867, No. 111, by which the Common Council was forbidden to pass any ordinance until it should have provided certain sanitary regulations. Acts of 1867, p. 207. We can not determine whether this point is seriously insisted on, or whether it formed any part of the reasons for judgment below. It might be sufficient to remark that the plaintiff in this record does not show any legal interest in discussing this question with this defendant. It will, we imagine, be time enough to examine the validity of this ordinance when the issue shall be raised.

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by some one on whom the ordinance confers a right, or imposes a duty, or inflicts a wrong.

Third—The plaintiff attempts to show that the shifting of the defendant's tracks will necessitate the removal of the platform which covers the canal, and so will cause discomfort and ill health in the vicinage. The testimony is unsatisfactory and conflicting. It is not rendered even probable that the removal of the tracks will be followed by the removal of the covering of the canal; it is not rendered certain that the uncovering of the canal will be followed by the predicted evils; but, granting that these results will occur, we are still unaware of any legal obligation on the part of the defendant to the plaintiff requiring it to keep covered a draining canal of the city of New Orleans.

On the whole, we conclude that the changes of the canal and of the banks on either side are the work of the city of New Orleans, to the discretion of whose municipal authorities such work is properly confided (14 An. 452, 842); that no act of the defendant, whether done or threatened to be done under the permission given to it by the city, so far as this record shows, can be said to inflict a legal injury on the plaintiff, and that the defendant is entitled to judgment.

It is therefore ordered that the judgment appealed from be reversed and the injunction issued herein dissolved, and that there be judgment in favor of defendant, with costs in both courts.

No. 750 —MARY Z. KNIGHT, Administratrix, v. E. B. MENTZ,
Sheriff, et al.

The act of 1855, No. 200, p. 254, under which a married woman is authorized to execute a mortgage on her own property by observing the formalities therein prescribed, does not abrogate nor do away with the rules laid down in the Civil Code by which she is authorized, by and with the authorization and consent of her husband, to mortgage her separate property for a debt which inures to her separate use and benefit. 15 An. 94; 21 An. 398; 22 An. 457.

The husband is not incapacitated from testifying that the debt for which his wife gave a mortgage on her separate property inured to her separate and sole advantage.

A PPEAL from the Third Judicial District Court, parish of St. Mary.
Train, J. Arthur F. & Clay Knoblock, for plaintiff and appellant.
Gates & Caffery, for defendants and appellees.

Howe, J. On the twenty-eighth October, 1856, Mrs. Josephine Baskerville executed a mortgage in favor of Henry Knight (now deceased, and whose administratrix is the plaintiff), which was recorded December 19, 1856. It was not reinscribed until the second August, 1867.

On the twentieth June, 1866, Mrs. Baskerville executed another act of mortgage on the same property in favor of Gordon & Castillo, which was recorded on the twenty-seventh June, 1866, and in which she

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bound herself to obtain thereto the authorization of her husband. On the twelfth day of July, 1866, the husband, by public act, gave the promised authorization, which act was recorded on the same day.

On the third November, 1866, Mrs. Knight, administratrix, obtained judgment on her mortgage debt, and recorded the same on the twenty-eighth November, 1866. Under this judgment she caused the property to be sold and bought it in, retaining the purchase price in part satisfaction of her writ.

In October, 1869, the Union Bank, being the holder of three of the notes given to Gordon & Castillo, secured by the mortgage of twentieth June, 1866 (which contained the pact of non-alienation), took out executory process to collect the same, which the plaintiff, Mrs. Knight, administratrix, by this action enjoined. The court *a qua*, after trial, dissolved the injunction, and the plaintiff has appealed.

First—The appellant contends in this court that upon the application for order of seizure and sale the Gordon & Castillo mortgage was not shown to have been recorded in such way as to authorize executory process. This point was not made by the pleadings in the court below, and we see no reason to reinstate an injunction on such a ground, when by authentic evidence introduced on the trial without objection, it appears that the mortgage was duly recorded at the date above given, long before the executory process was issued. The familiar rule that an injunction will not be dissolved when it appears that another ought forthwith to issue upon the facts that appear, does not here apply.

Second—The appellant contends that the act of twelfth July, 1866, by which the husband gave his promised authorization to the Gordon & Castillo mortgage, was null and void for want of compliance with the formalities prescribed by article 2272, C. C., in regard to acts of confirmation and ratification. If we concede that the plaintiff can raise this question, and raise it here for the first time, and that the act of the husband is confirmatory and recognitive, and not original in its character, yet an examination of the document fully satisfies us that it fulfills the requirements of the art. 2272 [2252]. It recites the act of mortgage of June 20 in terms which leave no doubt; it contains its substance; mentions the object to be attained, to wit, the authorization of the husband, and the intention of supplying this defect; the defect is supplied; and then the wife, joining in the execution of the paper, confirms and ratifies. The object of the rules of the Code, that a party shall not be held to ratify an invalid act, unless it appears that he knew with precision what act he was ratifying, and was aware of the defect he was waiving, and deliberately agreed to waive it, was fully satisfied.

Third—It is contended by the appellant that the Gordon & Castillo mortgage is null and void because not executed with the formalities.

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prescribed by the statute of 1855, No. 200, p. 254. It will be noticed that the wife makes no complaint. But if we concede that the question may be raised by the plaintiff, we are still of opinion that it is settled adversely to her views. In *Rice v. Alexander*, 15 An. 94, the subject was fully discussed, and it was decided that this statute did not repeal the rules of the Civil Code under which a wife, with the authorization of her husband, may mortgage her separate property for a debt which, as in this case, really inures to her separate benefit. This decision was followed in *City National Bank v. Barrow*, 21 An. 398; and the effect of the statutory proceeding is again noticed in *Miller v. Wisner*, 22 An. 457. We see no reason to depart from this line of authority.

Fourth—It is urged by appellant that the evidence of Baskerville, the husband, which was received without objection, to prove that the advances made by Gordon & Castillo inured to the separate and sole advantage of his wife, is liable to the charge of interest and partiality, and does not suffice to establish the facts to which he testified. We do not perceive the force of this proposition. No attempt was made to contradict or impeach him. The judge *a quo*, who saw and heard him, appears to have considered him worthy of belief, and he had no interest in this controversy.

Judgment affirmed.

23	539
119	786

No. 748.—FORMESIA NASH, Administratrix, etc., v. THOMAS R. MUGGAH.

A voluntary retrocession of property after the action to dissolve the sale has been prescribed, has no legal effect on a creditor of the vendee who has acquired a mortgage on the property subsequent to the sale. If, therefore, the vendee has retroceded the property after the action of retrocession is barred by prescription, the vendor takes back the property, subject to the mortgages which the vendee has placed upon it subsequent to the sale.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. D. Caffery*, for plaintiff and appellant. *Frederick Gates*, for defendant and appellee.

HOWE, J. On the nineteenth August, 1858, Thomas R. Muggah sold to Julia C. Muggah a tract of land, for the price of which she executed two promissory notes, secured by mortgage and vendor's privilege duly recorded, the first of the notes falling due March 1, 1859, and the second March 1, 1860.

On the third November, 1866, Mrs. Mary Z. Knight, administratrix, having obtained judgment against Julia C. Muggah and William J. Nash, *in solido*, recorded it, and compelled Nash, the surety, to pay it. Nash died and the present plaintiff was appointed his administratrix.

On the fourth August, 1870, Mrs. Julia C. Muggah, by notarial act, acknowledged her indebtedness to her vendor, Thomas C. Muggah, for

the price of the land, declared her inability to pay the same, and retroceded to him the property.

In October, 1870, the plaintiff, as administratrix of Nash, legally subrogated to the judgment as against Mrs. Julia C. Muggah, instituted this hypothecary action against Thomas R. Muggah, third possessor, to enforce the judicial mortgage imposed as above upon the property in 1866, while Mrs. Julia C. Muggah was owner.

The main defense made was that the voluntary retrocession to T. R. Muggah, made August 4, 1870, restored the property to him free and clear of all mortgages that might have been imposed upon it by the vendee during her ownership, which ownership was defeasible by reason of nonpayment of the price. *Chretien v. Richardson*, 6 An. p. 2.

To this the plaintiff replied that at the time of the retrocession more than ten years had elapsed from the date at which the price became exigible; that not only were the notes prescribed, their accessory mortgage preempted, and the vendor's privilege lost, but that the right of action to dissolve the sale was prescribed by the lapse of more than ten years; and that there being no right of action to dissolve, there could be no voluntary retrocession producing an equivalent result.

The court *a qua* sustained the views of the defendant and dismissed the suit, and plaintiff has appealed.

We are constrained to think that there was error in the judgment. There is no dispute about the fact that the action to dissolve the sale for nonpayment of the price was prescribed in March, 1870, by the lapse of ten years. *George v. Lewis*, 11 An. 654; *George v. McNeill & Knox*, 23 An., p. 354. It would seem to result from this that at that moment the title of Mrs. Muggah, theretofore defeasible, became indefeasible; and upon this indefeasible title the grasp of the plaintiff's judicial mortgage was instantly fixed. Five months after Mrs. Muggah made the retrocession. If we concede that her acknowledgment of the debt for the price was a renunciation of the acquired prescription which then barred the action to dissolve, still this renunciation should not be permitted to prejudice the plain rights of plaintiff previously acquired. C. C. 3466 [3429]; 1 An. 330; 2 An. 546; 8 An. 505.

The case of *Johnson v. Bloodworth*, 12 An. 699, relied upon by defendant, and the French authorities therein cited, are not here in point. The rule there settled was that the unpaid vendor, even by private unrecorded act, may enforce the implied dissolving condition against his vendee to the prejudice of the mortgage creditor of the latter; and the copious citations from the French jurists are made in support of the proposition, which it is not necessary here to discuss, that under the Code Napoleon the vendor's privilege and the right of resolution for nonpayment of the price are distinct rights, to be enforced by dis-

Formesia Nash, Administratrix, v. Muggah.

inct remedies. But neither in that nor in any other case to which we have been referred, is it held that a vendor whose action to dissolve has become barred by prescription, can, by an agreement of retrocession with the vendee, impair the rights of a mortgage creditor of the latter.

We do not think the defendant entitled to anything for improvements he claims to have placed on the land in 1859 and 1860, while it was the property of Mrs. Muggah.

For the reasons given, it is ordered that the judgment appealed from be avoided and reversed. It is further ordered that there be judgment in favor of the plaintiff, recognizing and rendering executory the judicial mortgage set forth in her petition against the lands therein described; that the said lands be seized and sold to satisfy the said mortgage debt, with interest as therein provided, and that the defendant pay the costs of both courts.

No. 757.—ALEXANDER G. FRERE, Tutor, v. WM. ROBERTSON, Testamentary Executor.—ANN H. SMITH and B. D. DAUTERIVE, Interveners.

A mortgage creditor who participated at a meeting of the creditors of an insolvent debtor and made no opposition to the homologation of the proceeding as agreed upon, is, after the homologation by the judge, precluded from requiring a sale of the property to be made for his benefit on terms different from those agreed upon at the meeting of creditors. But if a mortgage creditor be not present at the meeting of creditors, and be not represented therein, then, and in that case, he may, notwithstanding the deliberations have been homologated by the judge, cause the property, or a sufficient amount thereof to pay his debt, to be sold for cash.

A PPEAL from the Parish Court, parish of Iberia. *Theo. Fontelien*, Parish Judge. *D. Caffery*, for plaintiff. *Jos. A. Breaux, J. J. Gary*, and *Tucker & Davis*, for intervenors, appellants. *Deblanc & Perry*, for defendant and appellee.

WYLY, J. The plaintiff, and the intervenor Mrs. Smith, who joined in his demand, have appealed from a judgment dismissing the rule requiring the sale for cash of certain property belonging to an insolvent succession, administered by the defendant. The plaintiff, and Mrs. Smith, legal mortgage creditors of the succession of Leonard J. Smith, whose mortgages were recognized in the same judgment against said succession, seek to obtain an order to sell for cash the property mentioned in the rule, to pay their claims, and for the liquidation of the succession. The objection is, that the court has already ordered the sale of the property on terms fixed by a meeting of the creditors of the insolvent succession under articles 1172, 1173, 1174 and 1175, C. C.; that the plaintiff was a party to said meeting, and did not require the sale for cash of so much property as was necessary to pay him, either at the meeting of the creditors, or at the homologation of the proceed-

Frere, Tutor, v. Robertson, Testamentary Executor—Smith and Danterive, Interveners.

ing by the judge, and that he can not complain of the loss of his right to require the sale for cash under articles 1176 and 1177, C. C., because he failed to assert it, although a party to the *concurso*. Undoubtedly a mortgage creditor has the right ordinarily to demand the sale for the payment of his claim, but where, in an insolvent succession, a sale has been provoked under the articles above referred to, a mortgage creditor participating in the proceeding and failing to assert the privilege which those articles give him over ordinary creditors in the manner therein indicated, can not ignore the proceeding, and demand the sale of property to pay him on terms other than those fixed by the judge on the proces verbal of the meeting of the creditors. He is bound by the proceeding in which he participated, and if he failed to obtain the right which articles 1176 and 1177 gave him over ordinary creditors, it was by his own *laches*. 17 An. 72.

The court had the right to order the sale on terms different from those fixed for forced sales by the articles of the Code of Practice, in a case like this, where the terms were advised by a meeting of the creditors. A mortgage creditor has no more rights at a *concurso* of this kind than other creditors, except that of requiring the sale for cash of sufficient property to pay him. If he fails to assert this right when participating in a proceeding under articles 1173, 1174, 1175, 1176 and 1177, C. C., he loses it by his own *laches*.

It was the duty of the judge in homologating the proceeding of the meeting of the creditors to order the sale on the terms advised, unless the mortgage creditors participating therein, required to be sold for cash sufficient property to pay them. C. C. 1176, 1177.

Now, the plaintiff did not require the sale to be made for cash, and the judge had no right to so order it for his benefit, in homologating the proceeding. If he had done so he would have violated article 1177, C. C., which declares that: "The judge on homologating the proceedings is bound to order to be sold for cash so much of the property of the succession as will be sufficient to pay the creditors by *privilege*, or mortgage with interest and costs, *if they require the sale to be thus made*."

Now, because the plaintiff failed to exercise a right which belonged to him as a member of the meeting of creditors in virtue of the character of his claim, we do not see that the order of sale on the terms fixed by the creditors is on that account an absolute nullity, and need not be regarded by him.

If a mortgage creditor fails to assert his right when participating in a proceeding of creditors to fix the terms of sale, he will not be heard complaining of the consequences. But the plaintiff insists that as he voted "against the selling of the properties belonging to said succession of Smith, for the present," he did not consent to the terms of the

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sale advised by the other creditors, and is therefore not bound by the proceeding.

In voting to postpone the sale, we are not aware that a mortgage creditor has greater rights than ordinary creditors. It is certain he can require the sale of sufficient property for cash to pay him if he so desires, and the judge is bound to order it. But the judge is not bound to order it if he is not required to do so at the time he homologates the proceedings in which the mortgage creditor participated. 19 An. 81; 4 M. 450; 10 M. 54.

In regard to the intervenor, Mrs. Smith, who has joined in the prayer of the plaintiff, and asks that a sale be made for cash to pay the amount of her mortgage, we think her demand is well founded. She was not a party to the proceeding resulting in the order of sale referred to, and is not bound by it. 2 R. 201. She was not represented by the attorney of absent creditors, because she resided in the parish of Iberia at the time, and is not bound by his waivers.

It is therefore ordered that the judgment appealed from be affirmed as to the plaintiff; and as to the intervenor, Mrs. Ann H. Smith, let it be avoided and annulled, and it is ordered that as to her the rule be made absolute, at the defendant's costs. It is further ordered that the plaintiff and the defendant pay costs of this appeal.

No. 754.—AURELIA DUPRE, Tutrix, etc. v. P. I. MOUTON, Administrator.

The appeal will be dismissed *ex officio*, if no order of appeal has been granted by the judge *a quo*. An agreement of counsel entered on the minutes of the court, before judgment, giving to either party to the suit a devolutive or suspensive appeal from such judgment as may be rendered by the judge who has taken the case under advisement, has no legal effect whatever as an order of appeal from the judgment.

APPEAL from the Parish Court, parish of Lafayette. A. J. Moss, Parish Judge. M. E. Girard, for plaintiff and appellee. C. Debailon, for defendant and appellant.

HOWE, J. We find it necessary to dismiss this appeal *ex officio*. The judgment was rendered and signed, May 16, 1871, and no order of appeal was thereafter granted. Eleven days before the judgment was rendered, it appears by an extract from the minutes that the case was "taken under advisement, and to be decided in chambers, with the same effect as in open court. By agreement of both counsel, devolutive and suspensive appeal to both plaintiff and defendant is granted by simply filing the necessary bond, and notifying the opposite counsel."

An appeal is a method of revising a definitive judgment. C. P. 556. It is to be taken after such definitive judgment is rendered. C. P. 573, 574, 575, 578. An order of appeal, which is absolutely necessary,

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is the first step in the process by which the cause is brought within the jurisdiction of the superior court. 22 An. 458, *Norris v. Warren*. If it be conceded that the minute granted above is anything more than a memorandum of a consent by the attorneys, and amounts to an order of appeal, yet we know of no law which authorizes such orders in anticipation of the future rendition of a judgment. If a judge can grant an order of appeal to both parties, eleven days before judgment, he might go still further, and at the moment a suit is instituted, by anticipation, grant general orders of appeal, to all possible parties, from all future judgments.³

Appeal dismissed.

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No. 756.—*ELIE MCDANIEL v. ONEZIME GUILLORY et als.*

In this case the tutor was indebted to his wards, and his property was incumbered with a mortgage to that extent. To cause his other property to be relieved of this incumbrance, the tutor executed a special mortgage in their favor on a particular piece of property. This property thus specially mortgaged was subsequently sold by the tutor, and the vendee specially assumed the mortgage in favor of the minors. It was again sold by the vendee of the tutor, with a like assumption by the purchaser of the mortgage in favor of the minors. The heirs having become of age brought suit for the amount, and claimed a recognition of their tacit mortgage on the property of their tutor, now in the hands of a third possessor. The defense was prescription and the loss of the mortgage, on the ground of want of inscription.

Held—That each one of the successive purchasers having specially assumed the mortgage standing on the property in favor of the minors, registry of the mortgage was not necessary as to them; that the substitution of the special mortgage by the tutor for the general mortgage only served to limit the operation of the general mortgage to the particular property described in the special mortgage, and to release all other property of the tutor from the effect of the general mortgage; that the giving of the special mortgage on a particular piece of property did not, therefore, destroy or impair the legal mortgage on that particular piece of property thus specially hypothecated, and that under the allegation by the heir that he had a legal mortgage on this particular piece of property, he was entitled to have it recognized and enforced in the hands of the third possessor.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Baily, J. Martel & Hudspeth*, for plaintiff and appellant. *Moore & Morgan*, for defendants and appellees.

TALIAFERRO, J. The plaintiff brings this action against the defendants, Guillory and several others, to recover the sum of \$1500, with interest at five per cent. per annum from the thirteenth of April, 1860, which indebtedness he alleges arose in this manner: That on the fifteenth of April, 1856, Theophilus Fontenot became tutor to petitioner and his brother, Joshua McDaniel, and in that capacity received on their account from their mother's estate and from the estates of two deceased relatives, \$3360; that by law a tacit mortgage existed against the property of their tutor to secure his indebtedness to them; that in April, 1859, their tutor sold certain real estate to Emile Tate, which the parties to the act admitted was mortgaged to the petitioner and his brother for \$3360 owing to them by their tutor; that Tate bound him-

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self to pay respectively to each of the two minors one-half of this debt upon the attainment by them of the age of majority, or on their becoming emancipated by law. In November, 1859, Tate sold the property to Garrand and Onezime Guillory, joint purchasers. The act of sale recites that the property was purchased from Fontenot in the month of April preceding, in consideration of the sum of \$3000, stipulated to be paid to the minors McDaniel when they should attain the age of majority or become emancipated. This stipulation Garrand and Guillory specially assume. On the fifteenth December, 1860, Garrand sold his undivided half of the property to Guillory, the party now in possession. In the act of sale, Guillory assumed to pay the whole \$3000 to the McDaniels on the happening of the events previously stipulated, viz, their emancipation or attainment of the age of majority. The plaintiff prays judgment against the several defendants jointly and severally for \$1500, with interest, and prays that his mortgage against his former tutor be recognized, to take effect from the fifteenth of April, 1856, and enforced against the mortgaged property described in his petition.

It appears that Fontenot, the former tutor of the minors McDaniel, executed a special mortgage on the property in question in their favor, to operate a release of the remainder of his property from the operation of the legal mortgage resulting from the tutorship.

The defendants filed separate answers, denying the allegations of the plaintiff, and pleading prescription against the mortgage claims of the plaintiff. The acting judge, presiding in place of the judge of the district, recused, overruled the plea of prescription set up against the plaintiff's mortgage claims, on the ground that reinscription of the mortgage was not necessary as against the defendants, who by formal acts had specially assumed to pay the plaintiff's mortgage, but he declined rendering judgment on the special mortgage shown on the trial, for the reason that, in the opinion of the court, the plaintiff had declared on a tacit mortgage, and that judgment should conform to the pleadings. A personal judgment, *in solido*, was rendered against the defendants for the amount claimed. The plaintiff has appealed, and prays that the judgment of the lower court be amended so as to recognize the plaintiff's mortgage on the property described in the petition, and that it be enforced accordingly.

Three bills of exception appear in the record, and which relate to the admission of evidence. The disposition which we make of this case renders it unnecessary to pass upon them specially.

We concur with the judge *ad hoc* in the opinion that as the defendants who successively became owners of the property mortgaged, took it *cum onere*, and under the special obligation on their part to discharge the mortgage, they are placed by their undertaking in the same posi-

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tion that the tutor and original mortgageor stood as regards the plaintiff, and can take no advantage of the want of reinscription of the acts of mortgage. But we think the plaintiff has not lost his legal mortgage on the property described in his petition. The effect of the substituted mortgage was to limit the operation of the legal and general mortgage to the particular property specified and described in the special mortgage, and to release all his other property from the minors' general mortgage. Under the pleadings, then, a judgment should have been rendered to enforce the plaintiff's mortgage. Revised Statutes, p. 481, section 2435; 15 L. R. 218.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended in this respect; and to this end it is ordered that the property described in plaintiff's petition be seized and sold to pay and satisfy the plaintiff's demand, viz, the sum of \$1500, with five per cent. interest thereon from the thirteenth of April, 1856, until paid; and in all other respects that the judgment of the district court be affirmed, the defendants and appellees paying costs in both courts.

No. 749.—M. E. L. I. FRERE, Wife, etc., v. E. B. MENTZ, Sheriff, et al.

Two mortgage creditors seeking a preference over the proceeds of the sale of property mortgaged, can not, in a proceeding by third opposition, be permitted to attack the validity of each other's claims. In such a case it is not the right over the thing mortgaged that is to be passed upon, but the disposition of the proceeds of the sale of the thing mortgaged. In this form of action the respective rights to the proceeds must be determined by the priority of rank of the mortgage, without reference to the character of the claims.

The true doctrine on this point seems to be that if one creditor wishes to destroy the right of another for the purpose of securing a preference for himself, he must do so by direct action and not by way of third opposition.

APPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Frederick Gates*, for plaintiff and appellee. *D. Caffery*, for defendant and appellant.

HOWELL, J. This is a proceeding by third opposition in which plaintiff claims by preference the proceeds of property subject, as she alleges, to her rights of mortgage against her husband, recognized in a judgment obtained by her against him and duly recorded. The defendant, who caused the property to be sold under an execution, attacks the judgment of plaintiff against her husband as fraudulent and collusive; avers that if she was entitled to any judgment, it is satisfied; that the whole and not the undivided half sold at his suit of the property in question is liable to her claim, if any she have; and that a certain pretended *dation en paiement* from the husband to plaintiff, the wife, was fraudulent, and he prays that the said judgment and

dation en paiement be declared fraudulent, collusive, null and void, and that the sheriff be ordered to pay the proceeds in controversy to him.

To this demand for nullity the plaintiff sets up the prescription of one year.

The counsel for defendant, in his brief, presents the following proposition :

"The question on the point of prescription is, whether one, in the enjoyment of a right or possession of property, can be ousted of the one or evicted of the other by a party claiming by paramount title, without having the right to question the validity and fairness of his adversary's title, after a certain period;" or thus: "our exception of fraud and collusion is never too late, under the rule of *quae temporalia*, as long as plaintiff seeks to oust us under her fraudulent judgment."

It will be observed that in this the only question for determination is, whether or not defendant can properly invoke the rule *quae temporalia*, etc., that is, is he in the position to use the charge of fraud as a shield rather than as a weapon of attack?

In our opinion the defendant is not in the enjoyment of a right in the sense which authorizes the application of the rule invoked by him. It is true he may be said to be in possession or enjoyment of a right of mortgage from the date of the execution of that mortgage, which right he is entitled to have enforced against the property affected by it; but the plaintiff is in possession of a similar right attaching to the same property, and by our jurisprudence neither can prevent or enjoin the other from enforcing such right upon the property so affected; but they must make claim to the proceeds, as has been done in this proceeding, and the success of each depends on the virtue or rank of the respective rights. When thus presented, apparently in due and regular form, if one claimant wishes to evade or destroy the right of the other, which appears to be paramount to his, he must directly assail it, not in the form of an exception, with a view of maintaining himself in his secured position, but by an attack to obtain a better position than he seems or claims to occupy. In another view, both are seeking to get possession of funds to which both claim a right, and the rank of the right of one must be destroyed in order that the right of the other may be maintained or effectual. Such is defendant's position. He must destroy or remove the apparently paramount right of plaintiff before his right is made effectual or available. Hence he is not in a position to invoke the rule *quae temporalia*, etc.

We think there is force in the position taken by him that the mortgage of the plaintiff attaches to the whole property, the one undivided half of which has been seized under the execution of defendant, and that in order to sustain a judgment giving her the whole of the proceeds of said half, it should appear that the proceeds of the whole

property would not more than satisfy her claim. For aught that appears in the record the whole property is sufficient to satisfy the balance actually due her (whatever it may be) and leave a surplus for defendant. As well said by his counsel: "A third possessor is not personally liable to the mortgage claim. C. C. 3400 [3402]. He has his option to pay the debt for which the property is mortgaged or give it up. In the case, therefore, of a third possessor, holding a fractional part of the whole of the mortgaged property, he can only be compelled to pay the mortgage in proportion to the value of the part held by him to the whole of the property as an entirety."

It is the property of a third possessor in this category, the proceeds of which are involved herein, and the case must be remanded on this point.

It is therefore ordered that the judgment appealed from be reversed and that this cause be remanded to the lower court to be proceeded in according to the views herein expressed and according to law, costs of appeal to be paid by plaintiff and appellee.

WYLY, J., *dissenting*. I regret that I am unable to concur with the majority of the court on the question of prescription presented in this case.

I think the prescription announced in article 1994 of the Revised Civil Code has no application whatever to this case. That is a prescription, in express terms, applicable only to the action for the revocation of a contract. How the prescription of the action for the revocation of a contract can, by implication, be extended to an action for the revocation of a judgment, I can not imagine.

It is well known that laws of registry, of mortgage, of privilege and of prescription fall under that class termed *leges positivi*, and can not be extended by implication; they must be construed strictly. A law of prescription can not be supplied by jurisprudence; it must appear in some statute. Article 1994 and the section to which it refers will be searched in vain to find the announcement of a prescription to the action for the revocation or annulment of a judgment. Here the wife is opposing a judgment creditor of her husband and is contending that she has a mortgage of superior rank on the proceeds which the latter seeks to obtain in satisfaction of his claim. To this he replies her judgment is invalid because the claim on which it is based is fraudulent and unfounded. I think a creditor of the husband has the right to require the wife to show the validity of her claim at any time when it is opposed to the enforcement of his rights against the husband. A creditor whose rights are affected by it has this right. He was not a party to the decree of separation and is not concluded by it. Until it

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is opposed to the enforcement of his rights, the creditor need never attack it for fraud or otherwise. I think article 1994 means what it says, and nothing more. If the law-giver had intended that the prescription of an action for the revocation of a contract should be applied to an action for the annulment of a judgment, he would have said so; he would not have limited it, in express terms, to contracts.

I think the extension by implication of a statute of prescription to other objects than those expressed in the act, is a blow at the well settled principle of elementary law that that class of laws denominated *leges positivi* are not subject to liberal interpretation as other laws and are always to be construed strictly. I think the prescription of one year invoked by the wife in this case, to avoid the attack of her husband's creditor and to escape the responsibility to make good her claim in a competition with him for funds of the husband, should be disallowed, because it is a prescription applicable to contracts by the letter of the law, and the court has no authority to extend its operation to judgments.

I therefore dissent on this question.

No. 741.—ZENON BROUSSARD v. JOSEPH BREAU.

Proving that a debtor made a payment on the day and date that it is credited on his note is proving an acknowledgment of the debt.

Parol evidence, offered to establish that he made the payment as credited on the note, is therefore inadmissible after the maker has died and payment is sought to be enforced against his succession. 21 An. 350.

APPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Debaillon*, Judge *ad hoc*. *Deblanc & Perry*, for plaintiff and appellee. *M. E. Girard*, for defendant and appellant.

Howe, J. In the case of *Pavy v. Escoubas*, lately decided, and in the case of succession of *Hillebrandt*, 21 An. 350, we have had occasion to decide that a partial payment only interrupts the current of prescription, because it is an implied acknowledgment of the debt, and that, under the statute of 1858, parol evidence should not be admitted to prove such partial payment by a debtor since deceased. The plaintiff in this case contends with much earnestness that these decisions should be overruled, but his arguments fail to satisfy the court of the correctness of his position.

The defendant's objection to such parol proof in this case should have been sustained.

The claim in suit is clearly prescribed, and it is therefore ordered that the judgment appealed from be reversed, and that there be judgment for defendant, with costs of both courts.

Marie Irma Deville v. Hayes, Sheriff. Dupre v. Hayes, Sheriff.

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No. 755.—MARIE IRMA DEVILLE v. JAMES G. HAYES, Sheriff. DUREL DUPRE v. JAMES G. HAYES, Sheriff.

A judgment debtor who refuses to point out property when demand is made by the sheriff, thereby loses the right given him to point out property to be seized under execution. C. P. 646.

The fact that property of the judgment debtor has been seized, if not taken possession of by the sheriff, will not entitle him to an injunction to stay the sale. 9 Rob. 182.

An injunction will not lie to stay the sale of property under execution on the ground of inaccuracies in the description, if they were not such as could have deceived the judgment debtor.

The husband can not give personal property to his wife in payment of her judgment against him, after a seizure by his judgment creditor has been made. But if the sheriff in the execution of a judgment against the husband, fails to take the property into his possession, and the husband afterward gives it to his wife in payment of her judgment against him, then and in that case the wife can successfully enjoin the sale, because no legal seizure was made at the time of the giving in payment.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. H. L. Garland*, for plaintiffs and appellees. *Baily & Estilette and Thomas H. Lewis*, for defendants and appellants.

LUDELING, C. J. These consolidated cases are injunction suits to arrest the execution of the judgment of *Cecile Jannis v. Durel Dupré*. There was judgment perpetuating the injunctions, and the defendants have appealed.

The judgment debtor bases his injunction on the following grounds: *First*—He never was called upon to point out property.

Second—The sheriff made no seizure of any property, having never taken possession of the property.

Third—The notice of seizure does not correctly describe the property.

I. The deputy sheriff testifies that he called upon the debtor to point out property, and that defendant in execution refused and failed to do so. He therefore lost the right given to him to point out property. C. P. 646, 649.

II. If it be true that the property was not seized, because not taken into the possession of the sheriff, the debtor has no cause of complaint, and no grounds to invoke the aid of the courts. 9 Rob. 182.

III. The inaccuracies in the description of the property were not such as could have deceived the defendant. He knew what property was intended to be designated, and he could not have been in any manner injured by the slight inaccuracies of the description. 19 La. 301; 2 La. 63. The injunction sued out by Durel Dupré should have been dissolved.

In addition to the above alleged grounds for an injunction, the wife, Marie I. Deville, claimed to be the owner of the property seized. The evidence shows that in the suit between herself and her husband, the seizing creditor intervened and opposed her claim, and that after hearing, the property claimed by her in that suit was adjudged to belong

Marie Irma Deville v. Hayes, Sheriff. Dupre v. Hayes, Sheriff.

to her. The property thus decreed to belong to her was the plantation and improvements thereon, the stock of cattle and horses (in the possession of the husband), marked with the brands R. O., L. ° D. and R. H. And it is proved that on the twelfth July, 1869, a *dation en paiement* was made to the wife of the other property, which is advertised for sale, except the buggy, in satisfaction of the money judgment obtained by her against her husband.

The judgment was pleaded as *res judicata*. We think the plea correctly made. Whether the *dation en paiement* conveyed to the wife the other property claimed, depends upon the fact whether or not, at the time, a lawful seizure of the property had been made, for if a legal seizure existed at the time of the giving in payment, the acquired rights of the seizing creditor could not have been affected by it.

The evidence of the deputy sheriff leaves no doubt in our minds that he did not seize the Creole horses and mules, and other personal property advertised, because he did not take possession of them. 6 R. 348; Gobeau v. New Orleans and Nashville Railroad Company; 7 Rob. 504; 9 Rob. 182; 2 An. 333, 785, 910.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed; that the injunction sued out by Durel Dupré be dissolved with costs; that the injunction of Marie Irma Deville be perpetuated as to all the property seized except the buggy. and that the appellees pay costs of this appeal.

No. 758.—VALERY S. MARTIN, Administrator, v. SIDNEY AND WESLEY SINGLETON.

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The purchasers of a plantation at probate sale gave their notes to the administrator with an obligation, conditioned that if the heirs could not be forced to receive Confederate treasury notes in payment of the price, then the notes given were to be exigible. The heirs refused to receive Confederate notes in discharge of the debt. Suit was brought on the notes. Held—That inasmuch as the heirs had not accepted the Confederate notes in discharge of the debt, and under existing laws they could not be compelled to receive them, the notes given under the terms of the conditional obligation were still due and unpaid.

A PPEAL from the Third Judicial District Court, parish of St. Martin. Train, J. Deblanc & Perry and Felix Voorhies, for plaintiff and appellee. E. L. Simon and L. J. Gary, for defendants and appellants.

LUDELING, C. J. In September, 1859, the defendants bought at a succession sale a plantation, and for the price executed their notes, *in solido*, in favor of the administrator of the succession.

In 1862, the defendants offered to pay the notes in Confederate currency, and the administrator agreed to receive the currency, on condition that the heirs, to whom the proceeds of the notes would go when collected, could be forced to receive the currency, and the following agreement was signed by the defendants:

Martin, Administrator, v. Sidney and Wesley Singleton.

"August 1, 1862. The undersigned promise to pay to Simeon Valery Martin the sum of \$4394, for so much coming to the heirs of Eliza Steen, deceased wife of Henry Kellis, from the estate of Elias Steen. We promise to pay said amount if Mr. S. V. Martin can not force said heirs to accept Confederate notes in payment of their share; otherwise, if the heirs are forced to accept Confederate notes, this note will be null.

(Signed)

WESLEY SINGLETON,
SIDNEY SINGLETON."

The notes were delivered to the defendants.

This suit is to enforce the payment of the notes thus surrendered. There was judgment in favor of the plaintiff against Sidney Singleton for the whole amount. Wesley Singleton having died before the trial, there was no judgment as to him. There is no error in the judgment.

The condition, upon the happening of which the deposit of the Confederate currency was to be a payment or discharge of the obligations of the defendants, never occurred. The heirs did not receive the money, nor could they have been forced to do so in this State. The notes, therefore, according to the terms of the agreement, are still unpaid.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

No. 759.—FELICIEN GUILLORY v. MARIANNE MANETTE GUILLORY.

A contract made between a married woman and an overseer to oversee the plantation without the authorization or knowledge of the husband, is void and of no effect. Such a contract gives to the overseer no right of action to enforce it either against the wife or the plantation.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *E. T. Lewis*, Acting Judge, in place of King, J., recused. *H. L. Garland*, for plaintiff and appellee. *Bailey & Estelette*, for defendant and appellant.

TALIAFERRO, J. The plaintiff instituted this suit in the year 1865 against the defendant to recover \$1000 on account of wages as an overseer for that year, to which he alleges he is entitled under a contract previously entered into between them. A citation was served upon the defendant, but before issue joined the defendant died and the suit was renewed against her administrator, who filed an exception to the plaintiff's right to recover, on the ground that at the time of the alleged contract Madame Guillory was a married woman and not authorized by her husband to enter into the pretended contract. The exception was overruled, and the defendant answered by general

Felicien Guillory v. Marianne Guillory.

denial. The plaintiff had judgment for \$200, with legal interest, and the defendant appealed.

The plaintiff prays that the judgment be amended so as to allow him the whole of his demand.

It appears that for several years prior to 1865 the plaintiff, who was a brother of Madame Guillory, was overseer or manager for her, in the absence of her husband and sons, who were in the Confederate army; that he received a certain portion of the crop each year for his services; but, in January, 1865, she discharged him without cause, as the plaintiff avers, and that he was thrown out of business in consequence and suffered loss.

The facts shown give no color of right or justice whatever to the plaintiff's demand. The exception should have been sustained, as it is admitted on the record that at the time of the engagement entered into by the plaintiff with the defendant she was a married woman and her husband was not in any manner a party to the contract, and gave no authority to his wife to enter into it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of defendant, the plaintiff paying costs in both courts.

No. 761.—FRANK PERRETT v. J. BACHMAN LEE.

The fact that the creditor resided in the city of New Orleans, within the Federal lines of military occupation, during the late war, while his debtor resided within the Confederate lines of military occupation, both in the State of Louisiana, did not, under the dispositions of the Civil Code, work an interruption of prescription. The creditor can not, therefore, invoke such relation to defeat the plea of prescription.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *E. T. Lewis*, Acting Judge, in place of King, J., recused. *H. L. Garland*, for plaintiff and appellant. *E. D. Estelette*, for defendant and appellee.

HOWE, J. The only question raised in this case by the plaintiff, appellant, is in reply to the defendant's plea of prescription to three of the five notes in suit. They matured, respectively, on the fifth of February, 1860, 1861 and 1862. Citation was served March 25, 1867. More than five years having elapsed between maturity and citation, it would seem that the plea of prescription was properly maintained on the authority of numerous decisions.

The appellant states in his brief that he does not contend that prescription was suspended by the war, but that it was *interrupted* by the fact that the plaintiff resided in New Orleans during the war, while the defendant resided within the Confederate lines. We do not

find in our code any such cause of interruption defined. We are there told that prescription is interrupted by citation and by acknowledgment, and by the causes which are explained in the first section of chapter third of the twenty-third title of the code. C. C. 3460, 3461, 3551, 3516, 3517. The cause of interruption suggested by appellant is not in this category; nor can we imagine that (as he contends) the "natural interruption" of article 3517 has any relation to the facts of this case.

Judgment affirmed.

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No. 760.—J. W. BURBRIDGE & Co. v. J. J. ANDRUS.

The right to call a third party in warranty is conferred only upon the defendant in the action, and the judgment in warranty is dependent entirely on the judgment against the defendant in the main action. C. P. 362.

The holder of a promissory note indorsed in blank can not, therefore, proceed against the indorser as a warrantor.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. H. L. Garland*, for plaintiffs and appellants. *Martel & Hudspeth*, for defendant and appellee. *Moore & Morgan*, for warrantor.

HOWELL, J. This is an action against the defendant as maker of a promissory note for \$1200 and for the balance of an account. In answer the defendant alleged that the note was given for Confederate treasury notes loaned to him by the payer and indorser, R. S. Wilkins, and that since the institution of the suit he has paid the amount of the account. Plaintiffs then filed a supplemental petition, alleging that, as they had received said note from Wilkins for a valuable consideration, to wit: the amount thereof, and as he guaranteed the existence of a contract on the part of the maker, he is bound to plaintiffs for the amount of the note in case the maker sustains his defense, and they prayed that said Wilkins be cited to prosecute this suit conjointly with plaintiffs and decreed to pay them the amount of the note, with six per cent. interest, and costs.

Wilkins, for answer to the call in warranty, denies that he warranted the validity of the claim sued on or that the consideration of the note was legal, and avers that he simply transferred it by blank indorsement as negotiable paper and he is not bound in warranty thereon, not having sold it; that if responsible at all, it is only as indorser of negotiable paper, which, if not collectable on account of illegality of its consideration, he can not be compelled to pay, and that he is not sued as indorser.

Judgment was rendered dismissing plaintiffs' suit, and they have appealed.

 Burbridge & Co. v. Andrus.

In this court they admit that the consideration of the note was Confederate treasury notes, but they contend that Wilkins is responsible as the guarantor of the debt and that, as every indorsement is essentially an original contract, equivalent to a new bill in favor of the holder on the acceptor or maker, they are entitled to judgment against him.

Whatever may be the responsibility of the indorser of a note tainted with illegality, we think there is no cause or ground for a call of warranty in this case, and that the court did not err in dismissing the suit. "A personal warranty is that which takes place in personal actions; it arises from the obligations which one has contracted to pay the whole or a part of a debt due by another to a third person." C. P. 379. No such obligation was assumed by Wilkins, who is not sued herein as indorser.

We will add that by the Code of Practice a call in warranty seems to be conferred only on a defendant and the judgment thereon to be dependent on a judgment against him. C. P. 362, 363, 378 to 388.

Judgment affirmed.

No. 763.—CHARLES THOMPSON v. CLEOPHAS COMEAU, Administrator,
et al.

The district court has jurisdiction of a cause against a succession if the amount exceeds five hundred dollars, and also to declare that the vendor's lien exists on the property sold to the deceased. But in the settlement of the succession the parish court is not divested of its jurisdiction by such judgment.

The vendor's privilege is not required to be recorded as between the parties to the act. If, therefore, in a suit to enforce the lien there are no third parties who are affected, the fact of non-registry will not avail the defendant.

APPPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. Martel & Hudspeth*, for plaintiff and appellee. *H. L. Garland*, for defendants and appellants.

HOWE, J. The district court, in our opinion, had jurisdiction of this case, both to give judgment against the succession for the demand, which exceeded \$500, and to declare that for a part of the demand a vendor's privilege existed on the property sold by plaintiff to the deceased, and which was in his possession at the time of his death, and on the proceeds which were in the hands of the defendant, administrator.

Such a judgment will not prevent the parish court from "settling" the succession according to article 87 of the Constitution, and ranking the claims.

The vendor's privilege in this case was not recorded, and did not require to be recorded as between the parties to the sale, and they are, in strictness, the only parties before the court. It does not appear that

Thompson v. Comeau, Administrator, et al.

there are any third persons, creditors of the succession, as against whom a registry was essential. Such may, however, exist, and they should not be prejudiced by this judgment. It is therefore deemed proper to amend the decree in this regard. The trivial error in the amount of credits given by the judge *a quo* (if it does not fall under the rule "*de minimis*") should have been corrected by an application to him on the part of the defendants' counsel.

It is therefore ordered that the judgment appealed from be amended by reserving the rights of the creditors of Jacob Anselm, deceased, if any there be, to oppose the privilege of plaintiff in the settlement of the succession; that, as thus amended, the judgment be affirmed.

No. 762.—HELENA McDONALD, Wife, etc., v. JAMES M. THOMPSON, Sheriff, et al.

23 556
105 485

The husband is not a competent witness to testify on the trial of an injunction suit in which the wife is plaintiff, because his testimony must be either for or against his wife. C. C. 2281.

23 556
Case 2
122 470

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. Martel & Hudspeth*, for plaintiff and appellee. *Henry L. Garland*, for defendants and appellants.

LUDELING, C. J. This is an appeal from a judgment perpetuating an injunction obtained by the plaintiff.

During the trial the defendants took a bill of exceptions to the ruling of the judge *a quo*, refusing to permit the husband of the plaintiff to testify, on the ground that husband and wife are prohibited from testifying for or against each other. We think the ruling was correct. The husband must of necessity have testified either in favor or against his wife in this case. C. C. art. 2281.

We are convinced from the evidence, that the plaintiff is the owner of the property, the sale whereof was enjoined.

It is therefore ordered that the judgment of the district court be affirmed, with costs of

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
M O N R O E.

JULY, 1871.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,)

HON. R. K. HOWELL,)

HON. W. G. WYLY,)

HON. W. W. HOWE,)

Associate Justices.

No. 150.—JAMES A. SIMPSON *v.* J. J. HOPE, Sheriff, et al.

The court having jurisdiction over the parish where the defendant resides and has his domicile, has jurisdiction to stay the execution of a judgment that has been rendered against him in another parish. On the trial of such injunction to stay the execution of the judgment on the ground that it was rendered without legal citation, parol evidence is admissible to show the fact. A judgment that has been rendered against a defendant without citation, it is absolutely void, and the fact may be shown whenever and wherever it is sought to be enforced against him.

APPEAL from the Tenth Judicial District Court, parish of Caddo.
Levisse, J. Land & Taylor, for plaintiff and appellant. *Egan, Williamson & Wise*, for defendants and appellees.

WYLY, J. The plaintiff appeals from the decree dissolving the injunction sued out by him to restrain the execution of a judgment obtained in the district court of the parish of DeSoto, by Samuel Van Bibber, against him, on the ground that there was no citation, and because of the alleged slave consideration of the note on which the judgment was based.

Our attention is directed to the bill of exceptions taken by the plaintiff to the ruling of the court in rejecting the parol evidence

Simpson v. Hope, Sheriff, et al.

offered by him to prove that said judgment was rendered without citation, and that the return of the sheriff was untrue. We think the court erred. Citation is the foundation of the action, and a judgment without it is an absolute nullity. The district court of the parish of Caddo had jurisdiction to ascertain this fact, notwithstanding the rendition of the judgment by the district court of the parish of DeSoto. It would be unreasonable to require a party against whom judgment has been rendered without citation, to leave his domicile and to institute proceedings in a court of another jurisdiction in order to avoid the consequences of an absolute nullity. If the plaintiff was never legally before the court of the parish of DeSoto, as he proposes to prove, and resided at the time in the parish of Caddo, as we infer from the citation and the sheriff's return, why should he seek that tribunal in order to be released from a proceeding to which he was not a party, and which was an absolute nullity from the beginning.

It is therefore ordered that the judgment herein be annulled, and that the cause be remanded with instruction that the plaintiff be permitted to introduce proof in support of his plea that he was not cited, and was not a party to the judgment sought to be enforced against him. It is further ordered appellees pay costs of appeal.

No. 266.—STATE v. THOMAS WILSON.

The ruling of the judge *a quo*, on a motion for a continuance of a criminal case, involves both questions of law and fact, and can not therefore be examined on appeal, because the jurisdiction of the appellate court in criminal cases is limited to questions of law alone. Constitution, article 74.

As a general rule in criminal trials, the dying declarations of the person killed, and for whose murder the accused is on trial, are alone admissible, and the inquiries in such declarations must be confined to the circumstances and cause of his death. But if it be shown as matter of fact that another person was mortally wounded in the same difficulty, or by the same shot which killed the other party for whose murder the accused is on trial, then, and in such case, the rule above stated, is so far relaxed as to admit in evidence on the trial, the dying declarations of such third person.

If the deposition of a person in a criminal case does not show on its face that it is her dying declaration, it will not be excluded on that account, if it be shown by evidence *aliunde*, that it was her dying declaration.

A PPEAL from the Tenth Judicial District Court, parish of DeSoto. *Levisse, J. Jas. S. Ashton*, District Attorney, for the State. *Elam & Wimple*, for defendant and appellant.

TALIAFERRO, J. The defendant having been indicted and tried for the crime of murder, was convicted and sentenced to hard labor in the penitentiary during life. From the judgment inflicting this punishment, the defendant has appealed. The grounds stated for this appeal are set forth in three bills of exceptions taken to the ruling of the court on the trial of the case.

The first is to the refusal of the judge to continue the case upon.

affidavits of the accused in order to obtain testimony material and important to him in making his defense.

The second is to the admission of the dying declarations of Julia Dawson, as evidence against the accused, charged with the murder of William Dawson.

The third is to the admission in evidence of the deposition of Julia Dawson, taken before a justice of the peace, as the dying declaration of said Julia Dawson.

Continuances of cases, from the nature of things, must mainly depend upon the sound legal discretion of the judge. In determining a motion for continuance, he must necessarily consider the facts and circumstances upon which the application is founded. The question, then, is one of law and fact; and in criminal cases this court has jurisdiction only of questions of law. This has been frequently decided, and is now settled.

The next point presented is of graver import. Mr. Philips, in his work on evidence, vol. 1, p. 287, says: "The admissibility of dying declarations has been limited even in criminal cases; and a rule has been laid down that such declarations are generally admissible only where the death of the declarant is the subject of the inquiry, and where the circumstances of the death are the subject of his dying declaration." Upon the authority of this rule the counsel of the accused objected to the introduction of the dying declarations of Julia Dawson, in evidence against the accused, charged with the murder of William Dawson. In the bill of exceptions taken to the admission of this evidence, the judge *a quo*, assigns as his reasons for its admission, the following state of facts: "Before the prosecution had offered to prove the dying declaration of Julia Dawson, it had been clearly established that the said Julia was wounded mortally by the same shot, or, at least at the same time that William Dawson (for whose murder the prisoner is on trial), was killed. And it was already well established that the circumstances of the killing of William Dawson and of the declarant were precisely the same, occurring at the same time and place, and in the same manner, and from the same cause; and the prosecutor having proved that the said Julia Dawson had subsequently died from the effect of the wound so given. The court admitted the dying declaration of the said Julia Dawson, because all the reasons that make dying declarations admissible in any case, apply in this case."

It may be remarked that the rule above quoted, as announced by Mr. Philips, does not seem to be absolutely exclusive in its terms. We see also from the same work of the learned writer, that this rule does not seem to have been implicitly followed in England. He mentions a case, that of *The King v. Baker*, a parallel case, and closely resembling in its facts the one at bar, where it was held by Crompton.

State v. Wilson.

J., after consultation with Parke, B., that as it *was all one transaction* the declarations were admissible. We concur in opinion with the judge *a quo* that the reasons for the admission of the dying declaration of Julia Dawson are cogent, and we see no good reason, under the state of facts shown, why it should not have been received.

In his third bill of exception the counsel of the accused objects that the deposition of Julia Dawson does not show on its face that it was intended and taken as her dying declaration. That the State did not show by parol that the instrument was taken or intended as her dying declaration, and that the evidence did not sufficiently show that the declaration was made *in extremis*.

The deposition was admitted on the ground that it might be shown *aliunde* to be the dying declaration of the declarant. Parol proof established that the declarant at the time of making her declaration said she expected to die from the effect of her wound, and that in fact she did die from the effect of the wound in four hours after making her declaration. We think the ruling correct.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

No. 257.—STEWART & THEUS v. M. A. WALSH, Sheriff, et al.

If a mortgage has been recorded in the parish where the lands mortgaged are supposed to be situated, its validity will not be affected by the subsequent discovery, made in running the boundary line, that they are situated in the adjoining parish.

The court having jurisdiction over the parish where the mortgage is registered, and the chain of title to the property is recorded, has jurisdiction to enforce the mortgage by granting an order of seizure and sale of the property. In such a case the mortgageor can not successfully urge in defense to the sale that the property mortgaged lies in another parish, more especially if it is shown that the mortgageor is a resident of the parish where the order has been granted. In the latter case, if it were shown that the property mortgaged is situated in another parish, then the order might be directed to the sheriff of that parish.

APPEAL from the Tenth Judicial District Court, parish of Caddo
Levisse, J. Nutt & Leonard, for plaintiffs and appellants. *A. D. Land*, for defendant and appellee.

HOWELL, J. Plaintiffs, as third possessors, have enjoined the seizure and sale of certain property in the suit of *R. C. Hynson v. R. C. Cummings*, pending in the parish of Caddo, on the grounds that the property seized is situated in the parish of Bossier, and the court in Caddo was without jurisdiction to grant the order of seizure and sale, and the sheriff of said parish is without authority to execute it. Defendant Hynson avers that the court of Caddo had jurisdiction, both of the person of the defendant and the land seized in the executory proceedings, and the act of mortgage held by him is recorded in said parish and contains the pact *de non alienando*.

Judgment was rendered in favor of defendant, dissolving the injunction, with damages, and plaintiffs appealed.

The land in question is situated on Shreve's Island, formed, it seems, by a cut off in the Red river some time anterior to the creation of the parish of Caddo in 1838, and the parish of Bossier in 1843, the dividing line between which is, by the several acts creating them, the Red river. The defendant contends that as the Red river at this point must be considered that portion which was then and has always since been navigable, that is, the "cut off," and not the "old river," which was not and is not navigable, the Legislature intended that stream as navigated to be the boundary of Caddo, and necessarily embraced and included the island within its limits or territory; while the plaintiffs urges the contrary, and claim to be supported by the established fact that the parish of Bossier has exercised jurisdiction over the said island, and has annually collected the parish taxes assessed upon the property thereon.

We do not deem it necessary or proper in this proceeding to attempt to settle the boundary between the two parishes, which are not before us. It is admitted that the acts of sales from several antecedent owners down to plaintiffs', are recorded in books of conveyances in the recorder's office of Caddo parish, and we are of opinion that, as to the parties to these acts at least, no insuperable objection can be urged to the jurisdiction of the court in Caddo to grant, and the authority to the sheriff to execute the order of seizure and sale against the said property, when, as in this case, the defendant in said proceeding is a resident of that parish, and it is doubtful in which parish the land is situated. The parties, by recording their titles in that parish only, may be considered as believing or treating the property to be within its limits, and we can see nothing in the circumstances which would invalidate the executory proceedings obtained in this instance.

It has been held that judgments or mortgages recorded in the parish where the lands were supposed to be situated, were not affected by the subsequent discovery, made in running the boundary line, that they were in the adjoining parish, as the jurisdiction exercised over the *locus in quo* is the result of a *common error*, which can not prejudice the rights acquired by mortgage creditors during its continuance.

Applying this principle here, if it should be found that the jurisdiction of Caddo parish, implied and recognized by the parties to the various sales in recording their titles and mortgages there, be proved to be an error, the said mortgage and property rights will not be prejudiced. And, besides, we can not see how the plaintiffs will be injured by the sale they injoin solely on this ground. They acquired no greater rights than their vendor, whose purchase was subject to the

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pact *de non alienando*, and therefore if he passed a title at all to them, it was subject under the above principle to the mortgage resting on it, and as the mortgageor resided in Caddo, the writ could be directed to the sheriff of Bossier and be by him executed, if the land be really in the latter parish.

Judgment affirmed.

No. 272.—MATTIE M. HENDERSON, Executrix v. WALMSLY & Co. et al.

Parol evidence is inadmissible (except to prove fraud) to contradict the judicial records of a court. 3 An. 619; 12 An. 349.

A PPEAL from the Tenth Judicial District Court, parish of DeSoto. *Levisse, J. S. L. Taylor* and *Jas. S. Ashton*, for plaintiff and appellee. *Elam & Wimple*, for defendants and appellants.

This case was tried by a jury in the court below

LUDELING, C. J. It appears from the record, that in 1865, Walmsly & Co. instituted suit against Mattie M. Henderson, executrix, for twenty bales of cotton, which he alleged were worth \$4500; that a writ of sequestration was issued in said suit and twenty bales of cotton were seized under the writ. The sheriff's returns show that the cotton sequestered was appraised at \$4000. The defendant in that suit having failed to bond the property, Walmsly & Co. executed their bond for \$4000, according to law, and took the cotton sequestered out of the possession of the sheriff. Walmsly & Co. failed to prove their right to said cotton, and there was judgment in their favor for only one hundred dollars.

The present suit is on the delivery bond of Walmsly & Co. given for the cotton sequestered.

The defense is, that the cotton claimed in the sequestration suit was delivered by Mattie M. Henderson, executrix, five thousand pounds thereof before, and the balance after the suit was instituted, and that they received only nine bales of cotton under the sequestration.

On the trial of the cause, the defendants offered one Gooch (who is surety on the bond upon which this suit is brought) as a witness, to prove that only nine bales of cotton had been received under the sequestration and delivered to defendants, Walmsly & Co., to which the plaintiff objected on the ground that parol evidence was inadmissible to contradict the judicial records of the court; the objection was overruled, the evidence was received, and a bill of exceptions to this ruling was reserved.

The principle is elementary that the judicial records of a court can not be contradicted by parol evidence except to prove fraud. 1 Gen'l

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Ev., Nos. 275, 282 to 284; 1 Phil. on Ev., 548; 2 La. 48; 4 N. S. 176; 3 An. 619; 12 An. 349. The evidence should have been excluded. But even though the testimony of Gooch were in the record properly, it could not outweigh the judicial admission of Walmsly & Co., sworn to, to obtain the writ of sequestration, the returns of the sheriff and the recitals in the delivery bond signed by Walmsly and the witness, Gooch. There are other bills of exceptions in the record, which we consider unimportant to decide in this case.

We think the evidence in the record justifies a judgment in favor of the plaintiff for the amount of the bond, with legal interest from judicial demand.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that the plaintiff have judgment against Walmsly & Co., and W. D. Gooch, defendants, *in solido*, for the sum of four thousand dollars, with five per centum per annum interest from the seventeenth day of May, 1866, and the costs of courts.

No. 291.—GOTLIEB KING v. AMANDA J. WATTS, Administratrix, et als.

23	508
45	900

If a party has acquired a domicile in one parish, and removes therefrom to another parish, he may be sued and cited in the parish of his former domicile within one year after he removes therefrom, unless he has by public declaration in the manner provided by law declared the place of his domicile.

An injunction will not lie to stay the execution of a judgment that has been rendered by the confession or consent of the attorneys of record to the suit, if the evidence shows that the attorneys were authorized to file the answer, which formed the basis of the consent judgment. Nor can the action for the nullity of such judgment be maintained.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellant. *R. W. Richardson*, for defendants and appellees.

HOWELL, J. This is an action to enjoin and annul a judgment in the case of *J. T. Watts, Administrator, v. J. W. T. Richardson, G. King and W. H. Gale*, on a promissory note made by said defendants, on the following grounds:

First—Plaintiff did not appear, was not represented, and did not authorize an attorney to represent him in said suit.

Second—Said judgment was not rendered by default regularly taken or on final proof made.

Third—He neither confessed nor authorized any one to confess said judgment.

Fourth—Admitting he had an attorney, such attorney was not authorized to confess judgment or consent for one to be entered. The authority of an attorney at law does not include the power to confess or consent to a judgment.

Fifth—The district court of Ouachita was without jurisdiction *ratione materia*, as plaintiff then resided, and had for six months resided in

New Orleans, and no consent could be given to be sued in the parish of Ouachita.

The defense is a general denial, and a prayer for a dissolution of the injunction, with damages, and from a judgment in favor of defendants the plaintiff has appealed.

Some bills of exceptions are in the record, which from the view we have taken of the case it is unnecessary to examine.

Admitting that the plaintiff resided in New Orleans, as alleged, at the institution of the suit, the district court of Ouachita was not under the circumstances without jurisdiction, the plaintiff being within the exception provided by art. 167 C. P. to the general rule in art. 162. The former provides that "if the defendant change his domicile, he must be cited in the parish where he has resided within the last year, or within that where he has declared, in the manner prescribed by law, that he intended to have his domicile." The plaintiff resided in the parish of Ouachita within the last year preceding the institution of the suit, and he made no declaration in the manner prescribed by law where he intended to have his domicile. The article of the Constitution invoked by him relates to a political domicile or residence.

As to the question of appearance, the evidence legally admissible satisfies us that the judgment was properly rendered. The plaintiff does not pretend that he had or has a just defense to the suit, which was brought against him and two others on a simple promissory note made jointly and severally by them. He does not complain in his petition of a want of citation, of which there was a service, while it appears he accepted service of the petition and waived delay. On this point he denies that he authorized any one to appear for him. It is satisfactorily shown that Messrs. Stubbs and Cobb, attorneys, had prepared an answer for J. N. T. Richardson, and before it was filed said Richardson, King and Gayle came into their office together, and informed them that they, the defendants, had consented with the attorney for the plaintiff in the suit to a judgment with a stay of execution. Whereupon the answer was changed from the singular "defendant" to the plural "defendants," and thus filed, and the judgment rendered accordingly. The judgment recites that, "by reason of the law *and the evidence*, and by further reason of the consent of the attorneys of the plaintiff and defendants in open court, it is ordered," etc. The stipulated stay of execution was embodied in the judgment. Everything indicating that the agreement between the *three* defendants and the attorney of the plaintiff in the suit was faithfully and properly carried out. We are strongly impressed with the belief that King, the plaintiff herein, was in the court room at the time the judgment was rendered. We do not understand him as expressly denying it. However this may be, we are constrained to hold that his conduct

King v. Amanda J. Watts, Administratrix, et als.

and actions in the interviews with the counsel of Watts and those of Richardson, were sufficient authority to the latter to file the answer and give the consent to the judgment as they did, for we understand that the proceeding as to taking and entering the judgment was had in open court in the presence of the attorneys for both parties. The facts and circumstances must be very plain and unequivocal to convict members of the bar of such unprofessional and untruthful conduct as plaintiff's theory in this case implies.

We are unable to see any legal cause for enjoining or annulling the judgment in question.

Judgment affirmed.

Ludeling, C. J., recused.

No. 229.—W. B. BOYKIN, Under Tutor, v. A. C. HILL, Tutor.

If the tutor has failed to have an inventory of the minor's property made, and has omitted to have the mortgage in favor of the minor on the property of his tutor recorded, so that it will be preserved, the tutor may be dismissed from office at the suit of the under tutor. In a suit by the under tutor to dismiss the tutor from office for neglect of duty, the tutor can not be heard to urge in his defense that it was the duty of the under tutor to have the bond of the tutor recorded, in order that the minor's mortgage might be preserved on his, the tutor's property.

A PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *D. B. Hays*, Special Judge. *James W. Wilson*, for plaintiff and appellee. *A. C. Hill*, for defendant and appellant.

HOWELL, J. This suit was instituted in March, 1871, by the under tutor of the minor, *Jessie E. Jones*, to remove her tutor, who was appointed in January, 1867, on the following grounds:

First—The said tutor has neglected to cause an inventory to be made of the minor's property within the time prescribed by law.

Second—He has neglected to have his bond as tutor, or any certificate showing the amount of property in his hands belonging to said minor, recorded in the recorder's office of Claiborne or other parish where he owns immovable property, so as to preserve the minor's mortgages and privileges.

Third—He has failed to file annual accounts of his tutorship.

The defendant admits the matters of fact, but denies that they are sufficient of themselves, in law, to require his removal, and contends that the interests of the minor are amply protected by the bond furnished, though not recorded in the recorder's office; that it was equally the duty of the under tutor to cause said bond to be recorded, and he can not be heard to urge such neglect against defendant, and that the law does not require but simply authorizes annual accounts to be filed.

On the trial he objected to plaintiff's right to prove by the defendant himself that a specific sum of money had been received by him as tutor, on the grounds of irrelevancy and want of allegation of any

Boykin, Under Tutor, v. Hill, Tutor.

specific sum. The allegation is that defendant had received a considerable amount of money belonging to the minor, which authorized proof of the amount actually or known to be received, and for which defendant was liable, and which was endangered by his alleged neglect. The amount proven is largely above five hundred dollars, and hence the motion to dismiss must be overruled.

Article 356, R. C. C., a new article, says: "The tutor is bound to render an annual account of his administration, reckoning from the day of his appointment;" but his failure to do so is not necessarily a cause for removal, although it may under some circumstances be taken into consideration.

Articles 303 and 304, however, specially declare that persons are liable to be removed from the tutorship, who have neglected to cause an inventory to be made of the minor's property within the time prescribed by law, and who neglect to cause to be inscribed, in the manner required by law, the evidence of the minor's legal mortgage against his tutor.

We learn from the record that in 1859 the mother and stepfather of the minor were appointed tutrix and cotutor; that in 1867 their tutorship was admitted to be vacant by insolvency and resignation, and the defendant, on the recommendation of a family meeting, was appointed tutor, and gave bond in the sum of \$10,000, which was afterwards, in the same year, increased to \$20,000, because of some legal proceedings in the State of Maryland, where the larger portion of the minor's property is situated. But it does not appear that any inventory of her estate or that of her father has ever been made. If none had been made when the defendant was appointed, it was his duty under the law to cause one to be made. Art. 329, Code of 1825; art. 316, R. C. C. His neglect of this duty renders him liable to removal, and in connection with his failure to cause his bond or other evidence of the minor's mortgage to be inscribed, as directed by the act of 1869, page 114, by which the mortgage is lost under article 123 of the Constitution, constrains us to concur with the judge *a quo* that sufficient reason exists for his removal under the requirements of the law.

As to the position that the interests of the minor are amply protected by the bond furnished, it is enough to say that the law maker seems to think differently, and requires the additional protection of a mortgage upon the tutor's property to the extent of the amount of the bond, the surety and principal on which may not always be solvent.

The neglect of the under tutor to perform his duty to make the required inscription can not justify the defendant, or debar the former from presenting the matter to the judge who authorized him to institute this suit.

Judgment affirmed.

Citizens' Bank of Louisiana v. Isabella A. Fluker, Administratrix.

No. 191.—CITIZENS' BANK OF LOUISIANA v. ISABELLA A. FLUKER, Administratrix.—Third Opposition of L. M. B. RIND and Husband.

In this case it appears that a mortgage was given to secure a stock loan to the Citizens' Bank, dated in 1839; that in 1842 the bank foreclosed its mortgage and sold the property for an amount above the stock loan; that subsequently to the execution of the mortgage to the bank, and before the sale by the bank, the mortgageor became tutor to some minor heirs, and a tacit mortgage attached to his property for the faithful administration thereof. The purchaser of the property at sheriff sale soon thereafter executed another mortgage on the same piece of property in favor of the Citizens' Bank, to secure a stock loan in favor of himself. This latter mortgage the bank sought to foreclose. The heirs, who claimed a tacit mortgage on the property of prior date to the execution of this second mortgage to the bank, which tacit mortgage was duly recorded in 1869, intervened by way of third opposition, and claimed the proceeds of the sale of the property as first mortgage creditors. Held—That under this state of facts, the heirs having shown a prior mortgage of superior rank to that of the bank on the property seized, they were entitled to be paid by preference out of the proceeds of the sale.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellant. *W. J. Q. Baker*, for third opponents, appellees.

TALIAFERRO, J. The litigation involved in this case was to some extent before this court at its last term at Monroe, July, 1870. 22 An. 482. The question now to be determined—the priority of mortgage right as between the bank and Mrs. Rind—presents itself in this case. The tacit mortgage claimed by the opponent against the “Arpen” tract of land arose, as she avers, from a large indebtedness to her by her father, Nicholas D. Rind, who, in his capacity of natural tutor, received on her account from the executors of Thomas H. Martin a sum exceeding \$12,000. Her tutor's receipts, given at various times for the funds so received, were recorded in the mortgage office of the parish of Ouachita in 1869, to preserve her tacit mortgage.

This “Arpen” tract of land, with a number of slaves, was mortgaged in 1838 to the Citizens' Bank by S. W. Downs and James H. Brigham, partners in the business of planting. By this act of mortgage Downs and Brigham became stockholders in the bank, each for twenty-five shares of the capital stock of the company, and were thereby entitled to what are called loans. Brigham and Downs dissolved partnership in September, 1838, and by the act of partition Brigham became owner of the property, assuming to pay the mortgage to the bank, so far as it secured his seventy-five shares of stock. In April, 1839, Brigham sold the property to Rind, the father of the opponent, and Rind assumed to pay the loan of Brigham, obtained from the bank. The deed was recorded in the parish of Ouachita on the eighteenth of May, 1839. Rind failing to make payment, the bank foreclosed its mortgage on the property, which was sold at sheriff's sale on the sixth of August, 1842. The sheriff's return shows that he seized and sold the land, slaves, farming utensils and seventy-five shares of the capital stock of the Citizens' Bank, and that the property was purchased by W. W. Farmer,

at the price of \$6066 66 $\frac{2}{3}$ in cash, and that the amount of debt, interest and cost due the bank was \$3613 61, which was credited upon the order of seizure. The difference between the bank debt and the amount bid at the sale is \$2453 05, which was left in the hands of Farmer, over and above the payment of the stock loan to Brigham. On the thirteenth of August, 1842, Farmer and wife executed a mortgage in favor of the bank. The act recites that having purchased seventy-five shares of the capital stock of the Citizens' Bank, of \$100 each, making the sum of \$7500, and also that the mortgageors had obtained a loan of \$1800, they mortgaged a certain tract of land in the parish of Ouachita—the "Arpen" tract—which W. W. Farmer acquired by purchase at sheriff sale on the sixth of August, 1842, at the suit of the Citizens' Bank v. N. D. Rind, to secure these shares in the capital stock of said bank, and also to secure the principal and interest on the loan raised or to be raised to form the capital of said bank, by the issue of bonds, signed by the Governor of the State of Louisiana, in favor of the Citizens' Bank, etc. Farmer sold the land to a Miss McCaleb, and she to Daniel J. Fluker. After Fluker's death, the bank obtained an order of seizure and sale against his administratrix, the defendant in this suit. This order is predicated upon the undischarged obligations of Farmer to the bank, entered into as we have seen, in August, 1842.

Claiming to have against the "Arpen" tract of land seized by the bank, a tacit mortgage of superior rank to that of the bank, the opponent comes forward and demands to be paid out of the proceeds of sale of the mortgaged property the amount of her claims so secured by tacit mortgage alleged to be of anterior date to the bank's mortgage.

The bank, in answer to this opposition, denies that the opponent has any mortgage on the property seized, and if she has, it is of subsequent date and inferior rank to the mortgage of the bank.

There was judgment in favor of the third opponent, ordering that there be paid over to her the sum of \$3500 of the proceeds of sale of the "Arpen" tract. From this judgment the bank has appealed.

We think the judgment correct. The proceeds of sale of the property in 1842 satisfied the mortgage given by Brigham to secure the loan to him on his stock, and left an overplus of \$2453 05. It is shown that the tacit mortgage of the third opponent dates and takes rank for much the largest part of the tutor's indebtedness from the year 1839; consequently, her mortgage being next in rank to that of the bank for the stock loan to Brigham, she is entitled to this sum remaining after the stock loan was paid. True it is the property was sold subject to what is called the stock mortgage. By the organization of the bank and the principles upon which it was chartered, a subsisting mortgage was to continue to secure indebtedness to the bank, and also to secure the bonds issued by the State in aid of the bank.

Citizens' Bank of Louisiana v. Isabella A. Fluker, Administratrix.

After paying the stock loan mortgage of Brigham by the sale of the property on the sixth of August, 1842, there remained the balance we have before noticed in the hands of Farmer. The bank took the mortgage from Farmer on the fourteenth of August, 1842, eight days after the sale, upon the same property he purchased at the sale, to secure payment for the seventy-five shares of stock sold as Brigham's and purchased by Farmer, and also to secure a stock loan to him. Under the aspect the case presents, we conclude the decision had in the court below should be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 193.—SARAH A. BELL AND HUSBAND v. B. SILBERNAGEL & Co.

The authorization of the wife by the husband to institute and prosecute a suit in the court below includes the authority to take an appeal from the judgment rendered against the wife.

An action to annul a judgment can not be maintained if all the parties to the suit in which it was rendered are not made parties to the suit to annul.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall* and *D. C. Morgan*, for plaintiff and appellant. *Todd & Brigham*, for defendants and appellees.

WYLY, J. The motion to dismiss this appeal because the plaintiff, the appellant, a married woman, is not authorized by her husband or the court to prosecute it, is not well taken.

Her husband having made himself a party to the suit below for the express purpose of authorizing his wife, authorized all orders obtained in that court in her behalf, among them was the order of appeal obtained on motion.

We think authority to prosecute a suit means authority to prosecute it to completion and in all courts necessary to its completion.

The plaintiff enjoins the execution of the judgment which she confessed in favor of the defendants, B. Silbernagel & Co., in December, 1863, and seeks to annul said judgment upon the grounds stated in her petition.

The defendant, B. Silbernagel, excepted, on the ground that the other members of the firm of B. Silbernagel & Co. (now in liquidation) and co-owners of the judgment sought to be annulled, have not been cited and their names have not even been mentioned in the petition of the plaintiff.

On this exception the suit was dismissed, and the plaintiff appeals.

We think the court did not err. If the plaintiff desired to annul the judgment, she should have caused all the co-owners thereof to be

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made parties to her suit. Because the names of the members of the firm of B. Silbernagel & Co. were not set out in the judgment she confessed, which was not necessary in that case, is no reason why she should be permitted to set it aside, and thereby destitute the owners of their property without notice.

The exception setting out the names of the co-owners of the judgment, the members of the firm of B. Silbernagel (in liquidation), was filed on the seventeenth day of December, 1869; it was not tried and disposed of till the suit was dismissed thereon, October 21, 1870.

The plaintiff had for nearly one year notice that the co-owners of the judgment were not made parties to her action to annul it, and she seems to have made no effort to bring the parties into court. Such negligence in practice will not be sanctioned by the court.

Judgment affirmed.

28	570
46	008
23	570
115	400

No. 199.—J. GRAHAM, Auditor, v. G. W. & J. T. TIGNOR et al.

Prescription runs against all persons except such as are included in some exception established by law. C. C. 3540. The State does not fall within any of the express exceptions to the current of prescription.

Promissory notes given in favor of the Auditor of Public Accounts for the sale of school lands belonging to the State, are therefore prescribed by five years, the same as if they belonged to an individual.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Egan, J. J. D. Watkins*, for plaintiff and appellant. *J. W. Wilson*, for defendants and appellees.

TALIAFERRO, J. Two of the defendants in this case having purchased, under an act of the Legislature approved eighteenth March, 1858, one-half of the sixteenth or school section of land within one of the townships lying in the parish of Claiborne, executed, *in solido* with their surety, nine several promissory notes, each for \$88, dated first October, 1859, and payable consecutively, one note each year, on the first of October, with its accruing interest from date, with special mortgage on the land purchased. These notes were, in conformity with law, drawn payable to E. W. Robertson, then Auditor of Public Accounts, or his successors in office. None of these notes having been paid, the present plaintiff, in his official capacity, brings this suit to enforce payment.

The defense is prescription. The judge *a quo* sustained the plea as to the first six notes of the series, and rendered judgment against the defendants for the remaining three, according to their tenor, but without enforcement of the mortgage. From this judgment the plaintiff has appealed.

The sole question in this case is, does prescription run against the State on the notes sued upon? The defendants rely upon articles 3521

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and 3540 of the Civil Code, and upon several decisions of the Supreme Court of the State, and especially upon that of *Pepper v. Dunlap*, 9 An. 137. Article 3521 declares that "prescription runs against all persons, unless they are included in some exception established by law." Article 3540 declares that "all actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years." It is held by the defendants that these articles of the Civil Code have a clear and direct application to the case at bar, the State being a body politic or person, and the action being upon a promissory note.

Our Code seems clearly to determine that prescription applies without discrimination unless where there are express exceptions. We find no express exception in favor of the State. In the case presented, we think prescription does apply. The notes sued upon are secured by mortgage, and the plaintiff prays that the mortgage be recognized and enforced. We think the court *a qua* should have so decreed, and in this respect the judgment should be amended.

It is therefore ordered, adjudged and decreed that the judgment of the district court be amended so as to embrace the order now rendered, that the mortgage of plaintiff be recognized and enforced as prayed for, and that the lands stipulated in the petition of plaintiff and the act of mortgage made part thereof, be seized and sold to pay and satisfy the three promissory notes and interest for which judgment was rendered by the court *a qua*, and, as thus amended, the judgment be affirmed, with costs in both courts.

No. 207.—AMANDA J. SPIRES, Wife, v. D. S. MCKELVY, her Husband—
JOHN CHAFFE & Bro., Intervenors.

A judgment of separation of property between the husband and wife is void if not followed by a *bona fide* execution thereof, either by payment so far as the husband's estate can meet her demands, which must appear by authentic act, or by an uninterrupted suit to enforce payment.

If the wife has obtained judgment of separation of property from her husband, which has become void on account of non-execution thereof, she is at liberty to disregard it entirely and commence proceedings for a separation *de novo*. 6 An. 213.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Wells & Williams*, for plaintiff and appellee. *H. W. Drake*, for intervenors, appellants.

HOWELL, J. In June, 1870, the plaintiff instituted this suit to dissolve the community between herself and her husband and to recover, with mortgage, the sum of \$1500 (less \$380 paid on account), proceeds of cotton sold by him, stating, in her petition, that in April, 1868, she

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obtained judgment against him for a separation of property and the whole of said amount claimed herein; "but" (in the words of the petition) "being uninstructed as to her duty she did not have the same published, nor did she have execution issued until said judgment had become a nullity; hence she brings this suit *de novo*, showing that she has preserved her mortgage rights and is entitled to have them enforced."

The answer is a general denial. John Chasse & Bro., mortgage creditors of the husband, intervened to oppose plaintiff's demand, charging the suit to be fraudulent and collusive; setting up the plea of *res judicata* as between plaintiff and defendant, and denying that plaintiff has any cause of action against her husband.

On the trial plaintiff introduced in evidence the judgment obtained by her in April, 1863, awarding her a separation of property and the sum of \$1500, with five per cent. interest from twentieth January, 1868, and mortgage to date from first of April, 1866. This judgment was recorded on the eighth November, 1869. She also introduced the following agreement:

"It is agreed by the counsel for the plaintiff and intervenors in the above case, that the amount claimed by the plaintiff from McKelvy, her husband, is for cotton, which McKelvy used and which formed part of the succession of John Stout, former husband of plaintiff, and which was gathered on said Stout's place in the fall, after his death in the summer of 1862, his wife, the plaintiff herein, having a community interest in said cotton and being administratrix for John Stout's estate at the time the cotton was gathered. It is further admitted that McKelvy received and used said cotton in April, 1866."

The defendant is shown to be embarrassed with debt.

Judgment was rendered in favor of plaintiff, dissolving the community and for \$1120, with interest from date of filing petition, and mortgage on defendant's property to date from first May, 1866, and dismissing the intervention; from which judgment intervenors appealed.

The plea of *res judicata*, if sustained, would leave plaintiff with a good and valid judgment of separation of property and for the sum adjudged to her, with all her mortgage rights upon her husband's property, to date from first April, 1866, which would be more effective, probably, against the intervenors than the one sought in this suit. However this may be, the plea does not seem to be well made. In the case of *Dawson v. Creditors*, 6 An. 213, the court recognized the right of a wife to disregard a judgment, previously obtained, but not published and executed, and to sue *de novo*, on the principle that said judgment was a nullity. It seems to be well settled that a decree of separation, whatever its terms, does not separate the parties in prop-

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erty. It entitles the wife to a separation, but will be without effect, even between the parties, if not followed by a *bona fide* execution either by payment of her claims, so far as the husband's estate can meet them, made to appear by authentic act, or by a non-interrupted suit to obtain payment.

Upon the merits, the judgment does not seem to be fully sustained. From the statement of facts, agreed to by counsel, it seems that the cotton, sold by defendant for his own benefit, belonged to the succession of a former husband of plaintiff and administered by her. It does not appear that this succession had been settled and all the property vested in plaintiff. The most that can be presumed in her favor is that one-half of the community belonged to her and not that one particular piece of property or the half of any particular sum belonged to her.

Considering the somewhat irregular pleadings and management of this case, we think justice requires it to be remanded to enable the parties to establish their rights with more certainty.

It is therefore ordered that the judgment appealed from be reversed and this cause remanded to be proceeded with in accordance to law, plaintiff and appellee to pay costs of appeal.

No. 188.—JULIA CHRISTIAN, Administratrix, et als., v. ALVINIA C. LASSITER AND HUSBAND.

The issuing of an execution against the administrator in his individual capacity, on his failure to pay the judgment creditors of the succession out of the funds of the estate adjudged to be in his hands, is a sufficient compliance with the requirements of articles 1055, 1056 and 1057 of the Code of Practice to authorize proceedings by the creditor against the surety on the administrator's bond.

In such a suit the surety on the bond can not plead the defense that the debt on which the judgment against the succession is based was prescribed at the time of its rendition.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. Ray, J. Todd & Brigham and Newton & Hall, for plaintiffs and appellees. S. G. Parsons and R. W. Richardson, for defendants and appellants.

WYLY, J. The plaintiffs, Julia Christian, administratrix, Charles H. Morrison and Mary A. E. Wroten, as surviving partner in community of E. B. Wroten, deceased, usufructuary and tutrix of her minor children, have instituted this suit against the defendants, the representatives of W. R. Lassiter, deceased, to enforce the collection of judgments which they hold against the succession of Reuben McMichael, Lassiter being one of the sureties on the bond of James N. McMichael, the administrator of said estate. The facts are correctly stated by the plaintiffs and are the following:

Mrs. Julia A. Christian, administratrix of the succession of Charles

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A. Christian, deceased, obtained a judgment against the succession of Reuben McMichael, deceased, represented by James N. McMichael, as administrator, in suit No. 3645 on the docket of the Twelfth District Court, parish of Morehouse, styled Julia A. Christian, administratrix, v. James N. McMichael, administrator, for the sum of \$1390, with eight per cent. per annum interest on \$1250, from the first January, 1860, and on \$140 of said amount, the same rate of interest from the sixth of March, 1861, together with all costs of suit.

E. B. Wroten, now deceased, obtained the judgments in the suit of E. B. Wroten v. James N. McMichael et al., numbered respectively 3400 and 3490 on the docket of the Twelfth District Court, parish of Morehouse, amounting in the aggregate to the sum of \$2540, with eight per cent. interest on the sum of \$1520, from the first of January, 1861; and from the first of January, 1861, to the first of March, 1861, a like rate of interest on the same amount; and the same rate of interest on \$1130, from the first of March, 1861, and costs of both suits.

C. H. Morrison, the other plaintiff, held two mortgaged notes, dated Bastrop, Louisiana, December 15, 1859, for \$400 each, and due, respectively, on or before the first day of January, 1861, and 1862, and payable to the said Morrison, or bearer, with eight per cent. interest from date until paid, and signed by R. McMichael.

On the thirtieth day of May, 1866, James N. McMichael, administrator, filed in the Twelfth District Court of the parish of Morehouse a provisional account of his administration of the estate of the said Reuben McMichael, deceased, which said account was opposed by all these plaintiffs on various grounds, as will be seen. Opposition of Julia A. Christian, administratrix, and amended opposition; opposition of E. B. Wroten; opposition of Morrison.

All these oppositions were tried in the parish court of the parish of Morehouse and judgment rendered thereon on the twenty-sixth day of May, 1869, and in this judgment the account of the administrator was corrected in many particulars, and \$17,490 was the amount shown to be in the hands of J. N. McMichael, administrator of the funds of the estate.

It was ordered that the several oppositions filed be sustained and the administrator required to pay to plaintiffs their several amounts, as set forth and claimed in this suit.

Notice of this judgment was served on James N. McMichael on the seventh day of June, 1869, and the return of the sheriff thereon states: "I made personal service by handing J. N. McMichael, administrator, a certified copy of this notice of judgment, and at same time I asked him if he intended paying this judgment, or the claims on which it was rendered, and he replied that he could not pay it—that he had nothing to pay with."

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The plaintiff then caused execution to issue against James N. McMichael, and the sheriff was unable to find any property belonging to him to be seized under the writ, after calling on McMichael and the plaintiffs in this suit, to point out property; and each and all of them failing to point out property, he then called on L. D. Williams and Alvinia C. Lassiter, wife of Williams, to point out property belonging to J. N. McMichael, to be seized under the writ, which they failed to do, and the same was returned in no part satisfied.

Having failed entirely to find property out of which to enforce their rights under their judgments and claims, as herein set forth, plaintiffs have instituted this suit against Alvinia C. Lassiter and husband, representing the only surety on the bond of said administrator in said parish.

The petition alleges there has been a breach of the said bond given by James N. McMichael, as administrator; that the said bond was executed on the ninth of January, 1862, for the sum of \$30,000; that W. R. Lassiter, deceased, was one of the sureties on the same; that he left an only child, the said Alvinia C. Lassiter, wife of L. D. Williams, both of whom, immediately upon his death, took possession of his entire estate, and by their acts and declarations have accepted the same, purely and simply, and made themselves liable for all the debts of his succession.

The defense set up is embodied in two exceptions filed and in the answer, in substance as follows:

"That this suit was premature, plaintiffs not having taken the necessary steps to enforce payment of the principal obligor, James N. McMichael, no motion having been made by them compelling the said McMichael, as administrator, to file a *brief statement* of his condition with regard to the succession of Reuben McMichael, deceased, and no execution could legally issue against said administrator until this had been done; denies that any legal notice of plaintiffs' judgment was served on the administrator; that E. B. Wroten, whose succession is not made a party, is without any legal representative; that the debts of Christian and Morrison were prescribed when the judgments were rendered, and the prescription of five years pleaded; that the judgments of the parish and district courts are erroneous and those of the former void, for want of jurisdiction," etc.

Upon these issues, the parties went to trial, and there was judgment in favor of Christian, administratrix, and Mrs. Wroten, for the amount of their judgments, interests and costs; and there was judgment in favor of the defendants, Lassiter and husband, and against plaintiff, Morrison, rejecting his demand, with costs.

From this judgment in favor of plaintiffs, the defendants have appealed, and the plaintiff, Morrison, has also appealed.

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As to the prematurity of the suit, the plaintiffs not having taken necessary steps to enforce payment against the administrator, the principal obligor, according to articles 1055, 1056, 1057, Code of Practice, we will remark the record of this case shows a sufficient compliance with those articles. No motion was necessary to compel McMichael, the administrator, to file a brief statement of his condition in order to ascertain the amount of funds of the succession in his hands. The account which he filed and which was homologated after the trial of the oppositions of the plaintiffs, showed that he had \$17,490, more than sufficient to pay them. He was duly notified of the judgment on the oppositions, in which he was required to pay plaintiffs out of the funds shown to be in his hands.

After his refusal to pay them, as ordered by the court, they caused execution to issue against him, individually, and used every means to enforce payment from him before instituting this suit against the heir of the surety on the administrator's bond.

In *Wells v. Roach*, 10 An. 543, where the curator had died, it was deemed sufficient to take a rule on his administrator to compel payment of the judgment against him for funds found to be due by the curator. On the discharge of the rule that the administrator of the curator had no funds, suit against the sureties on the bond of the delinquent curator was held not to be premature. In that case, as in this, the question was whether "the necessary steps had been taken" to enforce payment against the principal obligor before suing his sureties?

As to the prescription of the claims on which the judgments of the opponents are based, we will remark that is no defense to the suit on the bond of the administrator against his surety. The surety has no interest in pleading a prescription that does not inure to the benefit of his principal obligor, the administrator. The prescription of the claims of the plaintiffs was for the benefit of the succession, the heirs or creditors.

If the administrator holds \$17,490 for the estate, it is to him immaterial to whom the court directs it to be paid, whether to the creditors or heirs. He is bound to pay it to some one on the order of the court. This is his duty as legal mandatory. And the obligation of the surety on his bond is that he will perform his duty; that he will faithfully keep the funds intrusted to him and apply them as directed by the court. *Succession of Johnston*, 1 An. 76.

The other objections urged by the defendants are unworthy of serious consideration. 20 An. 512; 11 An. 78.

It is therefore ordered that the judgment herein, as to the plaintiff, Julia Christian, administratrix, and the plaintiff, Mary A. E. Wroten, tutrix, etc., be affirmed, and as to the plaintiff, Morrison, that it be

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annulled; and it is now ordered that Charles H. Morrison recover judgment against the defendant, Alvinia C. Lassiter, for eight hundred dollars, with eight per cent. per annum interest thereon from fifteenth December, 1859, and costs.

It is further ordered that the appellant, Alvinia C. Lassiter, pay costs of appeal.

No. 261.—JOHN N. CATLETT v. HEFFNER & LIKENS.

A suit brought on an obligation that is not due, is premature, and should be dismissed, leaving the party to his remedy when the obligation matures. C. P. 158. A sequestration may, however, issue where a privilege exists, notwithstanding the principal obligation is not yet due. C. P. 275.

23	577
46	480
23	577
47	747
23	577
49	944
23	577
121	790

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisce, J. Nutt & Leonard*, for plaintiff and appellee. *A. W. O. Hicks*, for defendants and appellants.

WYLY, J. The case is correctly stated by the defendant Heffner and is the following:

This suit was filed on the twenty-sixth November, 1868, to enforce the collection of a note for \$1038 43, due the first of January, thereafter, and to have enforced a mortgage upon one acre of land, and fixtures and appurtenances, given to secure the payment of the note. The plaintiff alleges that the defendant had unlawfully removed a saw and grist mill, a portion of the property mortgaged, off the premises to another place within the jurisdiction of the court, and that he fears and believes they will remove said property out of the State before he can have the benefit of his mortgage, and that he fears and believes they will conceal, part with or dispose of said property during the pendency of the suit, and prays for writs of sequestration, directing the sheriff to sequester and take into his possession said property, and, after all legal notices and delays, that he have judgment against defendants, *in solido*, for said sum and interest, and that his mortgage be recognized and enforced. On the same day the judge ordered writs of sequestration to be issued. The writ was issued, and the sheriff sequestered one saw mill, machinery and tackle in the possession of defendant, Heffner.

The defendants appeared and pleaded the prematurity of the action, and prayed its dismissal. On the same day they also filed a motion to dissolve the writs of sequestration. On the eighteenth of February, 1870, the defendant Heffner reconvened for damages against the plaintiff, and the court ordered the exception, motion to dissolve, and plea in reconvention to be referred to the merits. Death of defendant Likens was suggested, and leave granted to revive. Upon these pleadings the court rendered judgment for the amount of the note, and

ordered the property mortgaged to be sold, and sustained the writ of sequestration, and rejected the reconventional demand, and defendant Heffner appealed.

We think the plea of the prematurity of the action should have prevailed. The note which the plaintiff declared was due him on the day the suit was filed, November 26, 1868, was not due till the first day of January, 1869. The prayer of the petition is for a writ of sequestration, that said Heffner & Likens "be cited to answer hereto, and after legal notice and delays, your petitioner have judgment against them, *in solido*, for said sum, and interest and costs, recognizing his mortgage as herein set forth, and ordering the same to be enforced," etc.

The suit is to collect the debt, to have the mortgage recognized, and to sequester the property. Because the plaintiff, under the state of facts contemplated by article 275 C. P. may sequester the mortgaged property to prevent its removal from the State "before he can have the benefit of his mortgage," whether the same be due or not, does not give him greater rights than the mortgage gave or the debtors have consented he should have, as to the time at which he may enforce payment. The remedy contemplated by articles 208 and 275 C. P. is conservatory only; it is for the purpose of preventing the removal of the property from the State before the mortgagee "can have the benefit" of his special mortgage. They were not intended to alter the stipulation in the contract fixing the date at which the obligation was to mature. That was the accident of the contract, which it was lawful for the parties to agree upon. In this case the law which the parties made to themselves provides that the debt shall become due January 1, 1869, and article 158 C. P. says: "When the demand is premature, that is to say, when the action has been brought before the debt has become due, the suit must be dismissed, leaving to the party his right to bring his action in due time."

We do not understand that articles 208 and 275 C. P. were intended to modify or make an exception to the rule announced in article 158.

It is true, in the case before us, the debt had matured before the judgment was rendered. But if the principle contended for by the plaintiff be acknowledged, it would be extending these articles for a purpose not contemplated by them. Any fact or circumstance justifying the application of the remedy provided in them, would have the practical effect of altering the contract or the terms of the principal obligation. The accessory obligation of mortgage or the remedy provided therefor, would annul a material stipulation in the principal obligation, to wit, the date of payment consented to by the parties. If a debtor may be sued two months before his note is due, because of the application of a remedy appertaining to the accessory right of mortgage, he may, on the same principle, be sued ten years before the

Catlett v. Heffner & Likens.

debt has become exigible. The court would thus be called upon to enforce an obligation that the parties have consented should not be enforced till a given time in the future, and practically to enforce a contract not made by the parties. As the defendants could not be summoned to trial for judgment on the debt before it was due, the demand should be dismissed under article 158 C. P. This would not dismiss the demand for a sequestration, which was not premature, but was permitted by article 275 C. P. But this demand, it appears from the evidence, was made without sufficient cause. The defendants were not about to remove the property from the State. The sequestration should therefore be dismissed, for want of just cause.

It is therefore ordered that the judgment herein be annulled, and that this suit be dismissed at plaintiff's costs, without prejudice to his right to bring his action in due time. C. P. 158.

No. 233.—C. YALE, JR., & CO. v. J. G. RANDLE & CO.

Any party interested in a judgment may have the same revived by causing the judgment debtor to be cited before the court which rendered the judgment, before prescription has accrued. The restraining of the execution of a judgment by a writ of injunction sued out by the judgment debtor, does not interrupt the current of prescription. If, therefore, more than ten years are allowed to elapse from the date of the rendition of the judgment, without causing the judgment debtor to be cited, the judgment is prescribed.

A PPEAL from the Eleventh Judicial District Court, parish of Jackson. *Egan, J. James E. Hamlett and John Young*, for plaintiffs and appellants. *Richardson & McEnery*, for defendants and appellees.

LUDELING, C. J. This is a suit to revive a judgment obtained on the first of October, 1858. The petition was filed on the second of August, 1870, and on the same day service of "notice of the proceedings" was acknowledged for one of the defendants, and citation was served on the other on the fourth of August, 1870. More than ten years had elapsed between the rendition of the judgment and the institution of this suit, and the judgment was extinguished by the prescription of ten years, which has been pleaded in this case, unless in the interim the course of prescription had been interrupted by a citation to revive the judgment.

"Hereafter all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgment; *provided, however*, that any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issued according to law to the defendant or his representatives, from the court which rendered the judgment," etc. Acts of 1853, p. 250.

It is contended that inasmuch as the *execution* of the judgment was restrained by an injunction sued out by the defendants, prescription

was suspended during the pendency of that suit, under the equitable maxim, "*contra non valentem agere non currit prescriptio*." A sufficient answer to this is that prescription is the creature of positive law, which can not be overruled by a principle of equity. The law is mandatory, and courts are bound to obey it. No citation was issued to the defendants, in a suit to revive the judgment, until long after the judgment had been extinguished by proscription.

It is therefore ordered and adjudged that the judgment of the court *a qua* be affirmed, with costs of appeal.

No. 242.—ELIZA W. WOOLEY v. E. K. RUSS, Sheriff, et al.

A parish judge who grants an order of injunction from the district court, in the absence from the parish of the district judge, has no power or authority afterward to set aside such order on bond.

APPEAL from the Tenth Judicial District Court, parish of Bossier. *Levisse, J. Griffin & Snider*, for appellees. *J. D. Watkins*, for third opponents, appellants.

WYLY, J. On the twentieth day of August, 1870, the plaintiff filed a third opposition, and enjoined E. K. Russ, sheriff, from selling the land described in the petition to satisfy the writ of seizure of Carroll, Hoy & Co. v. the Succession of Samuel Harrison, deceased, on the ground that she acquired the property at the succession sale of said Samuel Harrison, her deceased husband, being a partner in community of the deceased and administratrix of his succession; that said sale was regular and legal; that by it the mortgage given to said Carroll, Hoy & Co. by the deceased became extinguished. She further avers that all the property of said succession has been sold, and the proceeds thereof applied to the payment of the debts set out on the tableau; that her final account was duly homologated and the administration discharged without opposition.

The suit was filed in the district court, and the injunction was granted by the parish judge, the district judge being absent. Citation was served upon the sheriff, but not on the other defendants, Carroll, Hoy & Co. On the third of September, 1870, the injunction was ordered to be set aside by the parish judge on the bond of Carroll, Hoy & Co., and on the same day the sheriff sold and adjudicated to them the property in dispute in part satisfaction of their writ of seizure. On the sixth of September, 1870, the suit of third opposition was called in the district court and default entered, and on the twelfth judgment was rendered in favor of the plaintiff, perpetuating the injunction sued out by her, and quieting her title and possession of the land in dispute, and decreeing the nullity of the order of the parish judge setting aside on bond the injunction pending in said district court, as though the same had never been granted.

Eliza W. Wooley v. Russ, Sheriff, et al.

From this judgment Carroll, Hoy & Co. have appealed. They assign for error, apparent on the face of the record, that said judgment is null and void, both as to perpetuating the injunction and annulling the sheriff's sale at which they bought the land, because they were never cited or appeared, and were condemned without a hearing; that the sheriff, Russ, is now out of office, and had no interest; that the judgment was without parties and null.

We entirely concur with the district judge that the parish judge was without jurisdiction to set aside the writ of injunction pending in the district court, and his order to that effect was an absolute nullity, and the injunction remained as though the same had not been granted.

We think the defendants, Carroll, Hoy & Co., should have been cited, and the court erred in rendering judgment without making them parties; the sheriff who was cited, having no personal interest, was rather a nominal party.

Justice requires this cause to be remanded in order to make proper parties, and to try the third opposition and injunction sued out by the plaintiff.

It is therefore ordered that the judgment herein be annulled, and that this cause be remanded for new trial; that the order of the parish judge setting aside the injunction and all the proceedings thereunder, be annulled and avoided, and that the injunction be restored. It is further ordered appellee pay costs of appeal.

No. 186.—J. B. PAYNE v. S. G. FERGUSON, Curator.

The acknowledgment in writing of service of citation of appeal by the attorneys of the appellee, who is a nonresident, proves a legal service of citation of appeal.

The allegation in the petition of appeal that the appellant is a judgment creditor of the succession to an amount above five hundred dollars, with a certified copy of the judgment annexed, is sufficient to establish an appealable interest from a judgment ordering the sale of the property.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *James Bussey*, Parish Judge. *D. O. Morgan*, for plaintiff and appellant. *Todd & Brigham*, for defendant and appellee.

WYLY, J. The motion to dismiss this appeal for want of service of citation on the appellee or his advocate, according to article 582 C. P., and because the appellant does not show an appealable interest, can not prevail.

The attorneys of record of the plaintiff, the appellee, a nonresident, acknowledged in writing service of the citation of appeal, and this appeal is from the judgment they obtained in behalf of the plaintiff. We think the service acknowledged by the attorneys of record in this case is the very thing that article 582 C. P. contemplates, in the ab-

Payne v. Ferguson, Curator.

sence of the appellee. The duties of the advocate are presumed to continue till final judgment in the court to which the appeal is taken.

The appellants, John Henry & Co., have annexed to their petition for an appeal a certified copy of the judgment for \$800, which they hold against the succession represented by the defendant. They show an appealable interest.

The plaintiff, an acknowledged and judgment creditor of the succession of James T. Payne, took a rule upon the defendant, representing said succession, to compel the sale of the property thereof to pay his claim, which amounted to upward of \$20,000.

In answer to the rule, the curator averred that it would be injurious to creditors to sell the property at the time; that at the death of J. T. Payne the laborers on the plantations belonging to him were under contract for the year; that provisions, teams and farming implements had been obtained, and that under the circumstances he, the curator, with the consent of the creditors, was carrying on said plantations for the use of the creditors; that the laborers have an interest in said crops, and it was impossible to place a proper value thereon; besides, the mules used on said plantations were needed to gather and prepare the crops for market. He therefore opposed the sale.

The rule came on to trial, and on the fifteenth day of August, 1870, the court gave judgment for plaintiff, ordering the sale of all the property, and requiring a supplemental inventory of certain other property omitted in the original inventory.

The appellants, John Henry & Co., obtained judgment against the succession on the second of June, 1871, and on the thirteenth of the same month obtained an order of devolutive appeal from the judgment on the rule obtained nearly twelve months previously. No fraud is alleged, and the evidence on which the rule was made absolute and the sale ordered, seems to be sufficient to justify the decree of the court.

We do not see that the plaintiff, an acknowledged creditor for a large sum, and holding a special mortgage on part of the property, was unreasonable or acted illegally in demanding the sale of the property to pay his claim. C. P. articles 990, 991, 992. He had this right, and there is no evidence that he ever renounced it. If he consented to let the curator continue the cultivation of the crops after the death of J. T. Payne, that did not deprive him of the exercise of his legal rights. If the property has been sold under the order of the court, and the proceeds in the hands of the curator represent its value the appellants, John Henry & Co., are not precluded from asserting their claim to the proceeds.

We see no reason to disturb the judgment.

It is therefore ordered that the judgment herein be affirmed. It is further ordered that appellants pay costs of appeal.

No. 250.—SUCCESSION OF E. H. DICKSON v. SUCCESSION OF D. F. DICKSON.

23	583
106	505
23	583
111	673

In this case the evidence shows that E. H. Dickson, the administrator, sold a crop of cotton in 1859, belonging to the estate he represented, and placed the proceeds thereof in the hands of his commission merchants, Hawkins & Norwood, of New Orleans; that he was an heir of the estate; that the other heirs were made aware of the fact, and made no objection thereto; that soon after the death of the administrator Hawkins & Norwood failed; that the heirs took no steps to get the proceeds of the sale of the cotton after the death of the administrator and before the failure of the commission merchants, Hawkins & Norwood.

Held—That under this state of facts the heirs could not recover from the estate of the administrator the amount of the proceeds of the sale of cotton belonging to the estate he represented which had been placed by him in the hands of the commission merchants, Hawkins & Norwood, who had subsequently failed, because the money was placed there with the knowledge of the heirs, who made no objection thereto, and because no misconduct on the part of the administrator was shown.

A PPEAL from the Parish Court of Bossier. *Lewis*, Parish Judge. *Richard W. Turner*, for plaintiff and appellant. *Griffin & Snider*, for defendant and appellee.

LUDELING, C. J. This suit was brought to recover \$14,324 99, on the ground that during the administration of the succession of E. H. Dickson, the administrator, D. F. Dickson, sold a crop of cotton belonging to the succession without authority of law, and that he left and placed the proceeds thereof in the hands of Hawkins & Norwood, commission merchants of New Orleans, until the said firm failed.

The succession of E. H. Dickson was opened in the spring of 1859, and David F. Dickson was appointed administrator thereof. The property of the succession inventoried was appraised at \$95,350 75. No cotton appears to have been inventoried. The evidence in the record shows that on the tenth of April, 1860, Hawkins & Norwood, commission merchants of New Orleans, had to the credit of the estate of E. H. Dickson, \$1604 71, and on the fifth of June, 1860, the proceeds of cotton sold by J. F. Wyche & Co., amounting to \$13,256 94, were transferred by them to Hawkins & Norwood, on the order of D. F. Dickson, administrator, and this sum was placed to the credit of E. H. Dickson in the books of the latter firm.

On the seventeenth of January, 1860, all the property inventoried was partitioned among the heirs, and in the month of August, 1861, David F. Dickson died, without having been discharged from the administration.

It is proved that there was no bank in Bossier parish receiving deposits, and none in New Orleans which paid interest on deposits from 1859 to the period when D. F. Dickson died.

It does not clearly appear whether the cotton sold had been shipped by E. H. Dickson or David F. Dickson, her administrator. But it does appear that Hawkins & Norwood had been the factors of E. H. Dickson during her life; that she was in the habit of leaving her money

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with them, and that the firm was in good standing. It further appears that D. F. Dickson was an heir of E. H. Dickson, and that his brothers, M. H. Dickson and J. W. Dickson, the one of age and the other emancipated, were present in the parish of Bossier, and that when the partition of the property was made in January, 1860, the father and tutor of the children of a deceased daughter of Mrs. E. H. Dickson was told by the administrator, D. F. Dickson, that there was a large amount of money belonging to the estate in the hands of Hawkins & Norwood. This is proved by the tutor, Simpson Newport, himself, and he further states that Hawkins & Norwood told him they would pay him the portion belonging to his wards if he would get the proper authority. Thus it appears that all the parties interested, personally or through their legal representatives, knew that he had this money in the hands of Hawkins & Norwood, and they consented to let it remain there, at least by their acquiescence, and after his death, in 1861, they neglected to attend to their interests or to have his succession opened until after the close of the late rebellion. Every administrator is bound to take care of the property intrusted to him as a prudent person, and to render an account of the fruits and revenues of the property, and he is responsible for damages occasioned by his misconduct. C. 1147.

The record discloses no misconduct on the part of the administrator. He discharged all the debts of the succession, having paid the last of them on the twenty-sixth of July, 1861, a few weeks before his death.

We think the evidence does not justify us in giving judgment on the reconventional demand.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

No. 255.—T. C. KIRK v. W. M. FOLSOM et al.

If goods which have been shipped in good order have been lost on the voyage it devolves on the carrier to show that the loss was occasioned by accidental and uncontrollable events, which, if established, the burden is then shifted on the shipper, before he can hold the carrier liable, of showing that the accident to the boat by which the goods were lost occurred through the fault of the carrier.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Land & Taylor*, for plaintiff and appellee. *Nutt & Leonard*, for defendants and appellants.

LUDELING, C. J. The plaintiff alleges that he shipped on the *Mary Ellen*, owned by defendants, certain goods which have not been delivered to him, and that the defendants owe him the value of said goods. The defendants allege that they were prevented from delivering the goods by an accident, caused by no neglect or fault on their part.

Kirk v. Folsom et al.

The goods having been shipped in good order and lost, it devolved on the defendants to prove that the loss was occasioned by "accidental and uncontrollable events." C. C. 2754. This, we think, they have done in this case. They proved that the boat was seaworthy, and that she sunk through no fault of the defendants; and several experienced steamboatmen testified that "it frequently happens that a steamboat will receive a jar, or strike something, not known at the time, and in consequence of which she will spring a butt and cause a leak, which will sink the boat while running, or even while at the landing, without there being any neglect or carelessness on the part of the officers of the boat." The evidence satisfies us that the sinking of the *Mary Ellen* was "occasioned by accidental and uncontrollable events." The accidental sinking of a boat is one of the perils of navigation excepted in the bill of lading; but if the sinking might have been avoided by skill and diligence, the carrier is liable. The burden of proof to establish want of skill or diligence in the officers of the boat, is on the plaintiff, who asserts it. 10 An. 413, *Price, Frost & Co. v. Ship Uriel, Master and Owners*; 12 How. 270, *Clark et al. v. Barnwell et al.*

The plaintiff has failed to prove any want of skill or fault on the part of defendants.

It is therefore ordered, and adjudged that the judgment of the court *a qua* be avoided and reversed, and that there be judgment in favor of defendants, rejecting plaintiff's demand, with costs in both courts.

Rehearing refused.

No. 217.—R. A. PHELPS, Sheriff, v. J. C. F. TAYLOR et al.

The possession of the lessee to the premises leased, is the possession of the lessor; the lessee can not therefore, during the time of the lease, contest the title of the lessor.

A judgment that has been rendered against a party who has not been cited, is void and will be reversed on appeal.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. D. C. Morgan*, for plaintiff and appellee. *Todd & Brigham*, for defendants and appellants.

HOWELL, J. Plaintiff, in his official capacity, sues upon two notes given on third January, 1870, by the defendants in favor of D. B. Douglas, sheriff, or his successors, and due first January, 1871, for the rent, respectively, of two plantations during 1870. The movables on each plantation were provisionally seized. One of the defendants, Taylor, the lessor, sets up an anterior title from one Haddock to one plantation and a prior lease of the other from one Mrs. Cleveland, and alleges that the sheriff illegally seized both plantations, and not being able to resist him, he consented to make the lease and give the notes sued on, and he asked that his vendor and lessor be cited in warranty,

Phelps, Sheriff, v. Taylor et al.

and the plaintiff in said seizure be cited to answer his demand for damages. The other defendant, Todd, was not cited and made no appearance.

Mrs. M. C. Cleveland presented a petition of intervention, claiming to be the owner of one of the plantations by purchase free of incumbrance, at a probate sale on first February, 1860, of the property of J. W. Cleveland, deceased, as per deed from W. C. Tait, administrator, which property she alleges was illegally seized by the sheriff in the suit of D. Pipes v. W. C. Tait, administrator, and W. C. Tait, and under said seizure claimed and exercised the right to have the same for the year 1870, and took one of the notes sued on, to which she is entitled, and she prayed that the plaintiff and defendants be cited and she have judgment on said note against the makers. This petition seems to have been filed by the clerk, and afterwards counsel moved that the intervention be allowed and served, which was refused on two grounds set out in the bill of exceptions taken to the refusal, to wit: Because a suit was pending in said court for the same cause of action: Because intervenor claims the nullity of the lease and at the same time demands the fruits thereof. A judgment was rendered against the two defendants *in solido*, and they took a devolutive appeal. Mrs. Cleveland filed a bond for a devolutive appeal, but we find no order of appeal asked for or granted on her behalf, without which there can be no appeal.

We have stated the pleadings at unusual length, because of their peculiar nature, and to make our ruling the better understood.

The defendant Taylor took two bills of exception, one to the sustaining of plaintiff's objection to having the warrantors and the plaintiff in the execution cited, and the other to the refusal to allow him to prove by the sheriff's return that said officer was without authority to make the lease sued on. The action of the judge was based on the grounds that the pleadings did not allow such parties to be brought in and such proof adduced.

The judge did not err. A lessee can not contest the title of his lessor during the time of his enjoyment of the leased premises. The possession of the lessee is the lessor's, whose title the former can not question. 10 La. 362; 2 R. 461; 6 R. 139; 10 An. 622. The lessee in this case did not offer to prove that he was disturbed in his possession during the year for which rent is claimed as evidenced by his notes sued on. The judgment against him was correctly rendered, but that against Todd, who was not cited and made no appearance, is erroneous. This the plaintiff admits.

It is therefore ordered that the judgment appealed from be reversed as to R. B. Todd, and affirmed in other respects. Costs of appeal to be paid by defendant, Taylor.

Byrne, Vance & Co. v. Garrett, Executor.

No. 195.—BYRNE, VANCE & CO. v. ISAIAH GARRETT, Executor.

A judgment is prescribed within ten years from its rendition under the act of 1853. The fact that a case was several years pending on appeal does not prevent the plaintiff from reviving the judgment. Unless revived in the manner indicated in the statute, it may prescribe pending the appeal, in case ten years elapses from the date of the signing of the judgment. If the judgment be prescribed for want of revival within ten years, the surety on the appeal bond is discharged. Where the debt intended to be secured by the appeal bond is discharged by prescription, the judgment debtor, the principal obligor, is released. Therefore the surety on the appeal bond of that obligor is also discharged.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiffs and appellants. *Franklin Garrett*, for defendant and appellee.

WYLY, J. This is a suit against the surety on an appeal bond.

The defense is the judgment, in which the bond was given in order to prosecute the appeal, has prescribed by the act of 1853, more than ten years having elapsed from its rendition in the district court before this suit was instituted, without an attempt to revive it under said act.

On this exception the suit was dismissed, and the plaintiffs have appealed.

Whether the prescription announced in the act of 1853 began from the date of the judgment in the district court or from the time it was affirmed on appeal, is no longer an open question. That act provides that: "Hereafter all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of the judgment."

"Rendition of the judgment," in the act, means when it was completed by the signing thereof by the judge. 21 An. 295; 23 An. 176.

The object of the bond was to secure the execution of the judgment if the appellate court should render judgment against the appellants.

The debt intended to be secured by the bond has been discharged by prescription; the defendant in that judgment no longer owes the plaintiffs therein; there is no longer a juridical necessity compelling the judgment debtor, the principal obligor, to pay the debt evidenced by the judgment. If the principal obligor be discharged, the surety of that obligor is also discharged.

The judgment was the highest evidence of the debt which the principal obligor in this case, W. S. Grayson, owed to the plaintiffs. After the rendition of that judgment he could not set up the same cause of action in another suit against the said W. S. Grayson. It stood as the most solemn evidence of the obligation subsisting between the parties. The moment this judgment was discharged in any of the modes provided by law, W. S. Grayson, the defendant therein, was released from his legal obligation to pay the plaintiffs. The discharge by prescription is just as effectual as by payment, compensation, voluntary remission, or any of the modes by which legal obligations become extinguished. There is no doubt, then, that W. S. Grayson was released by the prescription of the judgment. It follows, as a necessary con-

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sequence, that the surety on his judicial bond of appeal, whose succession is represented by the defendant herein, is also discharged. The defense of prescription is an effectual bar to recovery in this case.

The fact that the case was several years pending on appeal did not prevent the plaintiffs from reviving the judgment. The act of 1853, fixing the prescriptions of judgments at ten years from their rendition, also provides the only means by which it can be averted. If the plaintiffs have neglected to apply the means provided in that act to arrest prescription the fault is attributable to themselves. A mortgage may perempt pending the litigation to enforce it, if not reinscribed. In like manner, under the statute referred to, a judgment may be prescribed pending the prosecution of the appeal, if not averted by revival within ten years from its rendition.

Judgment affirmed.

No. 208.—S. GIROD, Testamentary Executor, v. MARTHA VINES.

In an action to rescind a sale of immovable property on the ground of lesion beyond moiety, parol evidence is inadmissible to prove that there was another consideration which entered into the contract besides that expressed in the deed. In such action, parol evidence is only admissible to show the value of the property at the date of the sale.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Todd & Potts*, for plaintiff and appellant. *Richardson & McEnery*, for defendant and appellee.

This case was tried by a jury in the court below.

HOWELL, J. The plaintiff, as executor of Thomas Williams, deceased, instituted this action to rescind a sale of immovable property made by Williams to the defendant on the twenty-third December, 1870, on the ground of lesion beyond moiety. The defense is that, for several months previous to the vendor's death he was infirm and in declining health; that plaintiff gave him constant care and attention, and nursed him at his urgent request; and that her services in that capacity were well worth \$500, which sum, in connection with and in addition to the \$100 expressed in the act of sale, was the cause and consideration of the property sold to her. She, therefore, alleges that it was not error, imposition, weakness or improvidence on the part of the vendor that induced him to make the sale, but that a full, just and legal equivalent was given by her for the land in question.

A verdict and judgment were rendered in favor of defendant, and plaintiff appealed.

On the trial plaintiff reserved bills of exceptions to the admission of parol proof of any price or consideration not expressed in the act of sale.

Girod, Testamentary Executor, v. Martha Vinea.

Under article 2276, R. C. C., the evidence objected to was inadmissible, as it was intended to prove something beyond what is contained in the act. "When parties have deliberately put their engagements into writing, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversations or declarations, at the time or afterwards, is rejected." Green. on Ev., vol. 1, art. 275. "When a contract has been reduced into writing, nothing which is not found in the writing can be considered as part of the contract." Starkie, vol. 2, p. 550.

This law of evidence applies to the instrument attacked in this suit. In it the parties agreed and stipulated that the price of the land was \$100, and they can not show by parol evidence any other price. Had they intended that the estimated value of the personal services of the vendee were a part of the price, in addition to the sum paid, they should have so expressed the fact and the amount in the act. The allegation that the vendor "was aggrieved by the said sale for more than half the value of said land," does not bring the case within the rule invoked by defendant, which authorizes parol proof of error or fraud to annul written contracts, and the plaintiff has not opened the door by adducing any proof of such error or fraud, but simply as to the value of the property at the date of the sale. The injury complained of is in the price agreed on between the parties, as evidenced by their written contract, which, by the rules of evidence, they can not contradict by parol proof. When the disparity in the price paid and the value of the property is shown, the law declares the injury, which authorizes the rescission of the sale. The defendant does not offer to prove that there was error in stating the price to be \$100 when it should be \$600, as was actually agreed on, but another and further consideration, to wit: her services, which, she alleges, are worth \$500.

Upon the question of value, the answer virtually admits it to be \$600 and the testimony of several witnesses fixes it at a larger sum.

It is therefore ordered that the verdict of the jury and the judgment appealed from be reversed, and that there be judgment in favor of plaintiff as testamentary executor of Thomas Williams, deceased, rescinding the sale of land described in the petition made by said Williams to the defendant on twenty-third December, 1870, upon the return of the price to said defendant, and thereupon said land be the property of the succession of said Williams; defendant to pay costs in both courts.

Rehearing refused.

No. 246.—F. C. PECK et al. v. C. N. GILLIS and Husband.

A suit for separation of property by the wife implies a relinquishment of the community. When, therefore, as in this case, the wife has obtained a judgment separating her in property from her husband, and the husband retains certain lands in his possession and under his control during the time of the execution of the judgment, which are not claimed or sought to be placed in the community, but are treated as the separate property of the husband, she will be held and treated as having relinquished her community rights therein, and her heirs can not afterward maintain an action against the vendee of the husband for one-half of the land conveyed by him on the ground that it was community property.

APPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Crawford, J. Garrett & Garrett* and *R. W. Richardson*, for plaintiffs and appellants. *Mayo & Spencer*, for defendant and appellee.

WYLY, J. In 1841, John H. Lovelace married the mother of the plaintiffs, Patience J. Lovelace, owning at the time the land involved in this suit.

In 1848 this land was sold under a judgment against him, and was bought by Truman Phelps, and on the fifth day of April, 1850, it was sold by Phelps to the former owner, John H. Lovelace. This occurred during the marriage. In November, 1850, Patience Lovelace instituted suit against her husband for separation of property, and for judgment for \$4000 paraphernal funds. On the fourteenth day of June, 1851, judgment was rendered in her favor for \$500, decreeing a dissolution of the community and authorizing her to administer her own property as a *femme sole*. This judgment was executed by payment, evidenced by notarial act, in October, 1851. In 1853 Mrs. Lovelace died. In 1866 the land was sold by John H. Lovelace to the husband of the defendant, by whom it was conveyed to her in 1868.

This suit was filed on the eighteenth day of February, 1871, by the heirs of Mrs. Lovelace, to recover the undivided half of the land described in the petition, and the value of the rents thereof for the years 1868, 1869, 1870 and 1871, on the ground that said property, so acquired in the transfer from Phelps, was community property, and at the death of their mother, in 1863, the ownership of said undivided half vested in them as her heirs.

The defense is:

First—That the sale to Phelps by the sheriff was so irregular that it operated no divestiture of title, which remained notwithstanding in John H. Lovelace, who owned the property long before the marriage with the mother of the plaintiffs; that the conveyance from Phelps to Lovelace was without warranty—was merely a release of a right which was not valid, for the purpose of securing peace and avoiding litigation, and was not such implied acknowledgment of the title in Phelps as to preclude him, Lovelace, from disputing it.

Second—Conceding the validity of Phelps' title and the acquisition of the property by the community in April, 1850, still the plaintiffs

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can not recover, for the reason that their mother, under whom they claim, sued for and obtained judgment dissolving the community, and having failed to accept, is legally and conclusively presumed to have renounced it.

The court gave judgment rejecting the demand of the plaintiffs, and they have appealed.

We entirely concur in the conclusion of the district judge.

The community of acquets and gains was dissolved in 1851, and the judgment for the amount of her paraphernal funds has been duly executed. A suit for separation of property implies a relinquishment of the community. The judgment discharges the wife from its liabilities upon the implied relinquishment of her residuary right in the assets thereof. She can not have the advantages of the gains and escape the encumbrances imposed upon partners in community. It is true that article 2430 of the Revised Civil Code declares that "the wife who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest to do so, and upon her contributing, in case of acceptance, to pay the common debts." This is a right given to the wife, which she may exercise after her separation of property, provided it be to her interest to do so, and upon her contributing, in case of acceptance, funds to pay the common debts. By this article she is only restored to participation in the common property existing at the time of the separation of property, but not to the gains subsequently acquired by the husband during the marriage. It is a conditional restoration, based upon the consent of the wife to pay part of the debts, in order to take part of the property belonging to the community at the time of the separation of property.

It is not a right which the wife is presumed to accept. Having sought to escape the liabilities of the community, the presumption is the incumbrances were greater than the value of the common property. Nevertheless, the article referred to gives the wife the right, if it be to her interest, to accept the community of gains upon contributing to pay the common debts.

This right has never been accepted in the case before us. The condition upon which the partial restoration contemplated by article 2430 should take place, has never been consummated. The mother of the plaintiffs never consented to pay part of the community debts, after the separation of property, in order to participate in its gains existing at the time of the dissolution thereof.

We conclude there was no restoration of the gains of the community under article 2430, and that the heirs of Mrs. Lovelace have failed to establish their title to the property in dispute, and their petitory action must fail.

Judgment affirmed.

Ray v. Tatum, Administrator.

No. 244.—JOHN RAY v. J. P. TATUM, Administrator.

If the administrator has filed a classification of the debts due by the succession, and has obtained an order of the parish court homologating the same, then a creditor whose account has been thus homologated and ordered to be paid out of the funds in his hands, may, on his refusal, cause execution to issue from the parish court, notwithstanding the amount is above five hundred dollars or above the ordinary jurisdiction of the parish court, the jurisdiction of the parish court being unlimited in purely probate matters.

APPEAL from the Parish Court, parish of Jackson. *Nat. Rives*, Parish Judge. *James E. Hamlett*, for plaintiff and appellee. *Kidd & Smith*, for defendant and appellant.

TALIAFERRO, J. The defendant, in his capacity of administrator, having, at the instance of the plaintiff, a creditor of the succession of Sherrand, filed, in obedience to an order of the parish court, a classification and order of payments of the debts of the succession, the plaintiff was placed on the tableau as a creditor to the amount of \$985 90. This classification was duly homologated by the parish court and an order rendered by it for the payment of the creditors accordingly. After the lapse of more than ten days from the rendition of the judgment, and the administrator having failed to make payments in conformity therewith, the plaintiff took a rule against the administrator to show cause why execution should not issue against him according to law for the said sum of \$985 90, with interests and costs. The administrator, in answer to the rule, excepted to the jurisdiction of the parish court, on the ground that the amount sought to be enforced exceeds the sum of \$500. The exception was overruled and the rule made absolute. From this judgment of the parish court the defendant appealed.

The proceeding is not a suit for or against a succession. In accordance with the administrator's own exhibit of the debts of the estate and with the order he proposed to pay them, a judgment was rendered without opposition, homologating the tableau and ordering the payment of the creditors whose debts were acknowledged and placed upon it. Article 983 provides that: "All debts in money which are due from successions administered by curators appointed by courts and by testamentary executors shall be liquidated, and their payment enforced by the courts of probates of the place where the succession was opened." The administrator having failed to pay over the money in his hands to the creditor decreed to be entitled to receive it, the creditor is authorized by articles 993 and 1057 to take out execution against him and cause his property to be seized and sold to a sufficient amount to pay the debt. We find nothing in the law to prevent a creditor from enforcing, in this manner, payment of a debt ascertained by judgment against a succession, where the administrator, having funds, refuses to pay it, especially when he is ordered by the proper court to make the payment.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be affirmed, with costs.

Morrison v. Flournoy & Co.

No. 203.—C. H. MORRISON v. A. F. FLOURNOY & Co.

An attorney at law who has been employed is under obligation to give advice when called upon by his client, and he is entitled to a just compensation therefor.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellant. *Richardson & McEnery*, for defendants and appellees.

WILLY, J. The plaintiff sued the defendants on an account of \$860 for professional services, as follows:

Fee for defending suit of J. H. Brown v. A. F. Flournoy & Co.	
on a note for \$752 25 and interest.....	\$100 00
Also, suit of J. A. Coon, administrator, v. A. F. Flournoy & Co. on note for \$1050 and interest.....	100 00
Fee for adjusting boundary line between Flournoy and Noble.	150 00
Fee for defending suit, R. W. & R. Richardson v. J. H. Brown & Co.; Flournoy & Co., garnishees.....	10 00
Fee for advice and assistance in arranging and compromising ten to fifteen thousand dollars' worth of debts due by the Flournoys in New York and Philadelphia.....	500 00
	<hr/>
	\$860 00

The defendants denied generally the allegations of the plaintiff. They admitted having employed the plaintiff in the suits of J. H. Brown & Co. against them, and J. A. Coon, administrator, against them, but aver that the former was compromised by their paying \$500; and in the latter they were damaged by following the advice of the plaintiff in going to trial, in which judgment was given against them for \$600, whereas they could have compromised it at \$200. They specially deny having employed the plaintiff in the compromise and settlement of the debts of A. F. Flournoy & Co., or that he in any manner assisted therein; and they deny that he was employed to adjust the boundary line between themselves and John H. Noble, and aver that he was the agent or attorney of Mrs. Copley, from whom they acquired the property contiguous to said Noble, and that it was his duty, as attorney of their vendor, to adjust said boundary.

The court gave judgment, on the verdict of the jury, for \$272 50 in favor of the plaintiff, and he has appealed.

The case presents mainly questions of fact, and the evidence is extremely conflicting. From the evidence, we are satisfied that the plaintiff was consulted in regard to the compromise which was subsequently accomplished by the defendants of their Northern debts. Whether they expected him to charge for advice or not, is immaterial. It is the business of an attorney to give advice when called upon, and he has the right to a just compensation therefor. From the evidence we estimate the value of this item of the account at \$250.

From the evidence we estimate the value of the services mentioned in the other items of the account as follows: For defending the suit, *Brown & Co. v. Flournoy & Co.*, \$75; Coon, administrator, *v. Flournoy & Co.*, fee, \$100; R. W. & R. Richardson *v. Flournoy & Co.*, fee, \$10; services in arranging the boundary between Flournoy & Co. and Noble, \$50. The account of plaintiff is satisfactorily established to the amount of \$485 in the aggregate.

In reference to the damage complained of in the conduct of the defense of Coon *v. Flournoy & Co.*, we will say the charge is not supported by the evidence; and in reference to the services in the adjustment of the boundary with Noble, the defendants have not shown an obligation on the part of the plaintiff to serve them without the right to exact remuneration for his labor.

It is therefore ordered that the judgment herein be increased to \$485, and as thus amended let it be affirmed, appellees paying costs of appeal.

Rehearing refused.

No. 220.—JOHN WATT & Co. v. A. R. HENDRY.

Citation of renewal of a judgment must issue from the court that rendered the judgment, whether the defendant resides in the parish where it was rendered or be a resident of some other parish of the State. C. P. 162. An exception that the defendant resides in another parish is therefore unavailing. Such citation may, however, issue in the name of or on the application of any person having an interest in the judgment.

The giving of a twelve months' bond for the price of property bid in under execution does not extinguish the debt nor novate the judgment. If the bond be not paid, the prescription applicable to judgments can alone be invoked by the judgment debtor.

APPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Crawford, J. B. G. Smith*, for plaintiffs and appellees. *R. W. Richardson* and *O. Mayo*, for defendant and appellant.

LUDELING, C. J. This is an action to revive a judgment. The defendant filed an exception to the proceedings on the grounds that he is a resident of the parish of Franklin, and he can not be sued in the parish of Catahoula, and that the parties plaintiffs in the suit are not the real plaintiffs, having sold their judgment to one Newman, and that Newman can not prosecute this suit in the name of John Watt & Co., a firm which has been long dissolved.

There is nothing in the record to show whether or not the exception was tried. But there is nothing serious in it. The act of 1853 provides that "any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issued according to law to the defendant or his representative, from the court which rendered the judgment." This is one of the exceptions expressly provided by law to the general rule that the defendant must be sued before his own judge. Ray's R. S. section 2813; C. P. article 162.

Watt & Co. v. Hendry.

The defendant, in his answer, alleged that the judgment was extinguished, because a twelve months' bond had been given in a proceeding under the judgment, that the twelve months' bond was prescribed by the lapse of five years, and that therefore the judgment itself was prescribed. The twelve months' bond did not novate the judgment, and whether the bond given for the price of property sold under seizure be extinguished by prescription or not, does not affect the judgment. The judgment is not prescribed, nor has the bond been paid.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

Mr. Justice Taliaferro recused.

23 596
45 260

No. 210.—STATE OF LOUISIANA *ex rel.* JAMES GRAHAM, State Auditor, and A. DUBUCLET, State Treasurer, *v.* THE JUDGE OF THE EIGHTH DISTRICT COURT OF THE PARISH OF ORLEANS.

The right of appeal is secured, not only to all parties in the suit, but to third persons when they are aggrieved by the judgment, if the amount involved is sufficient to give the appellate court jurisdiction. C. P. 571. When, therefore, the State Auditor and State Treasurer are made parties defendants in a suit, to compel them to register bonds of the State which have been authorized by law in favor of a railroad company, which registry by these officers is required by law as a prerequisite to their delivery to the company, and the judgment of the court requires them to make such a registry, then and in such case they or either of them have the right of appeal from such judgment secured to them, if the bonds sought to be registered are sufficient in amount to give the appellate court jurisdiction, and a mandamus will issue, on application of the Auditor and Treasurer or either of them, from the Supreme Court, directing the judge *a quo* to grant the appeal.

A PPEAL from the Eighth District Court, parish of Orleans. *H. C. Dibble*, Judge, respondent. *John Ray*, attorney for relators. *Hornor & Benedict*, for Auditor.

LUDELING, C. J. The New Orleans, Mobile and Texas Railroad Company instituted proceedings against the Auditor and Treasurer of the State of Louisiana to compel them to register bonds of the State in favor of the said company to the amount of \$750,000, in accordance with the provisions of the act No. 31 of the General Assembly of 1870. After hearing, the judge made the mandamus peremptory, commanding said officers to perform the acts required of them. They prayed for an appeal, which was refused by the judge. Thereupon a writ of mandamus was applied for to compel the judge to grant the appeal.

In his answer the judge assigns two reasons for his refusal:

First—Because the relators failed and refused to make proof in the lower court that they have an appealable interest.

Second—Because the Auditor and Treasurer “have no interest which would authorize them to prosecute an appeal before this honorable court, and they have no constitutional or legal right to prosecute such an appeal in the name of the State.”

State ex rel. Graham, Auditor, and Dubuclet, Treasurer, v. Judge of Eighth District Court

I. The object of the proceeding against the Auditor and Treasurer is to make them register bonds of the State of Louisiana in favor of the New Orleans, Mobile and Texas Railroad Company for \$750,000, so that said bonds might be delivered to them. If judgment had been rendered against the railroad company, would it have had the right of appeal under the allegations in the petition? We can not conceive that there could be a doubt of this. The matter in dispute is the issuing of bonds to the amount of \$750,000; the registration thereof by the Auditor and Treasurer being acts which, under the law of 1870, should precede their delivery to the railroad company.

II. The Auditor and Treasurer are the defendants in the suit. It would be most strange if they could not appeal from a judgment against them, when the matter in dispute exceeds five hundred dollars.

The cases relied on by the judge *a quo*, reported in 9 An. 400, and 12 An. 498, are totally inapplicable to this case. Article 564, C. P., declares that "an appeal is the act by which *one of the parties to a suit* has recourse to a superior tribunal, in order to have a judgment of an inferior court corrected." This right is secured not only to all who are *parties to the suit*, but to third persons when they are aggrieved by the judgment. Art. 571 C. P.

We consider the answer of the judge *a quo* insufficient to justify his refusal of the appeal.

It is therefore ordered that the Judge of the Eighth District Court of the parish of Orleans do grant a suspensive appeal as prayed for, according to law.

No. 231.—STATE v. R. W. SNOW and JOHN J. HOPE.

The omission of the district attorney to sign the finding of the grand jury, will not avail the sureties on the bond given by the accused before the indictment was found. 21 An. 600. The question as to how the amount came to be written in the body of a bond given for the release of a criminal can not be examined in a suit against the sureties for its forfeiture.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *W. J. Q. Baker*, Judge, *ad hoc*. *W. W. Farmer*, District Attorney, Fourteenth Judicial District, for the State. *J. & L. D. McEnry* and *Stubbs & Cobb*, for defendants and appellants.

HOWE, J. This is an appeal from a judgment of forfeiture of a bail bond for \$1000, given by defendant, Snow, as principal, and the defendant, Hope, as surety.

First—The appellants urge that the indictment found by the grand jury against Snow was not signed by the district attorney. The finding was signed by the foreman of the grand jury. Admitting that the omission of the usual signature of the district attorney at the foot of the indictment was an irregularity (and as to this we express no

State v. Snow and John Hope.

opinion), we do not perceive how it can avail the appellants. They gave the bond about a year before the indictment was found, conditioned that Snow would "appear at the next term of the court and from term to term, and there remain until discharged in due course of law, and not depart thence without leave of the court." Instead of appearing and urging the alleged irregularity of the indictment, Snow ran away and Hope failed to produce him when called for. The condition of the bond is clearly broken. *State v. Ainslie*, 13 An. 293; *State v. Loeb*, 21 An. 600.

Second—The appellants complain that on proceeding to perfect the bond the State offered and put in evidence without proof of signature a letter of Hope dated February 15, 1868, authorizing the sheriff to fill up with the amount of the bail a blank bond which Hope had left with him. We are unable to perceive the force of this objection. The letter was of no importance either for or against appellants. It bore date some time prior to the filing of the bond. There is no pretense that the signature to the bond is not genuine, that the amount is incorrect or the recitals insufficient. It was offered by the State as a part of the record, and it is rather late now to inquire into the manner in which the amount came to be written in the body of the instrument prior to its being filed.

Judgment affirmed.

No. 277.—*E. E. MARION v. B. M. JOHNSON*, 8228. *E. E. MARION v. B. M. JOHNSON*, 8231.

A party who makes a wall that has been constructed by the adjoining proprietor, one in common, incurs the obligation to pay the party who erected it one-half of the original cost thereof. This obligation to pay one-half its costs is not affected by the fact that the party who makes it one in common, is the owner of more than one-half of the soil on which it is built. 14 An. 338; 20 An. 554; 22 An. 114.

A party who, by his own act has made a wall that has been built between himself and his neighbor, one in common, can not thereafter put any additional wall, or put an iron front to his building which extends beyond the centre of such wall. Any attempt to do so will be restrained by an injunction, and the party thus attempting will be considered a trespasser, and will be condemned to pay the damages caused to the wall in common, with vindictive damages for the tort. R. C. C. 676.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Egan, Williamson & Wise*, for plaintiff and appellant. *Land & Taylor*, for defendant and appellee.

WYLY, J. These two suits were tried together.

In the first, the plaintiff sues to recover half the value of the partition wall which the defendant is making—a wall in common.

In the other, she enjoins the defendant from removing bricks beyond the middle of said wall, for the purpose of inserting his iron front, averring that he has removed bricks for a considerable space to the injury of her building, called the Phoenix House, thereby exposing

the inner wall and plastering of said house; and she claims \$1500 damages for the said trespass and injury.

In the first case, the court gave judgment for the plaintiff for \$100; and in the second, dismissed her demand and dissolved the injunction. From these judgments the plaintiff appeals.

The questions presented in these cases are neither new nor difficult of solution. Under the settled jurisprudence of this State, "a party who exercises his right of making a wall, one in common, can not resist the demand of his neighbor who erected the same, for one-half of its value, although he may have a claim to the soil upon which more than one-half the wall was built." *Davis v. Grailhe*, 14 An. 338 The facts of the case before us are almost identical with those in the case referred to, and for the reasons therein expressed we think this case should have the same conclusion. It is also well settled that the party building a wall which has become a wall in common, may recover from the other one-half the original cost of erecting it. 20 An. 554; 22 An. 114; and authorities there cited.

From the evidence we fix the cost of the wall at one thousand dollars. For one-half thereof, to wit, five hundred [dollars, the plaintiff should have judgment.

In reference to the second suit, we will remark that the defendant having made the wall, one in common, had no right to put his iron front beyond the centre thereof; and that the removing of the brick beyond that point, so as to expose the inner wall of the building of the plaintiff was a trespass for which she ought to recover actual and vindictive damages. The actual damages we fix at one hundred and fifty dollars, and the vindictive damages at three hundred and fifty dollars. There is no force in the plea of compensation. The plaintiff is not the debtor of the defendant for the soil occupied by the wall beyond one-half of its width. It still remains the property of the latter. The construction of a work on the soil of another imposes no obligation on the builder thereof to pay for the land. The remedy of the owner in such case is provided by article 676, Revised Civil Code. This remedy the defendant should have sought, if desirable, before making the wall, a wall in common. Having claimed the right accorded to him by article 676, he can not escape the conditions accompanying the exercise thereof.

It is therefore ordered that the judgments in these cases be reversed, and it is now ordered that the plaintiff recover judgment in the first case, to wit, No. 8228, for five hundred dollars, and all costs; and in the other case, to wit, No. 8231, it is ordered that she have judgment against the defendants *in solido*, for five hundred dollars, and also perpetuating the injunction herein, and requiring the defendants to remove all the constructions placed by them beyond the centre of the common wall, and also pay costs of both courts.

Mrs. Sarah A. Bell v. Francke & Danneel. Same v. Douglass, Sheriff, et als.

No. 192.—MRS. SARAH A. BELL v. FRANCKE & DANNEEL. Same v. D.
B. DOUGLASS, Sheriff, et als.

23	599
52	805
23	599
51	482

An injunction will not lie to restrain the execution of a judgment on the ground that it contains illegalities which affect the validity of the judgment itself.

Per curiam.—If it be conceded that the wife, separated in property from her husband, can attack a judgment that has been confessed by her for a debt which she has contracted with the authority and sanction of the judge under the act of 1855, then, and in such case, she must proceed by direct action to annul it.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *W. N. Compton*, attorney at law, Judge, *ad hoc*. *D. C. Morgan* and *C. H. Morrison*, for plaintiffs and appellants. *Todd & Brigham*, and *Newton & Hall*, for defendants and appellees.

HOWELL, J. Executions having issued against plaintiff, on judgments confessed by her in suits of *Francke & Danneel v. S. A. Bell*, and *B. Silbernagel & Co. v. S. A. Bell*, she obtained an injunction against both on the grounds that the debts for which the judgments were confessed were the debts of her husband, and the confessions were obtained from her through fraud and under marital influence. In the petition for injunction she asked only that the injunction be perpetuated, and that an act of mortgage in favor of *Francke & Danneel* be annulled and cancelled. She subsequently brought an action to annul the judgment in favor of *Francke & Danneel* on the same grounds, and these two suits were tried together below and are now before us in one transcript. The judge *a quo* dissolved the injunction against *Francke & Danneel's* judgment and perpetuated it in part against the judgment of *B. Silbernagel & Co.*

The defendants in the injunction suits severally moved to dissolve on the ground, among others, that if the facts alleged be true, plaintiff is only entitled to relief from the judgments confessed and enjoined by her in an action of nullity or on appeal.

As to the defendants, *B. Silbernagel & Co.*, this position must be maintained. If a judgment be so illegal as to be a nullity, resort should be had to an action of nullity and not an injunction. 16 L. 288. While a judgment exists it is a warrant for the execution, which can not be restrained for illegalities inherent in the judgment itself. Plaintiff does not ask that the judgment enjoined be annulled. Her injunction therefore, should be dissolved.

As to the other defendants, *Francke & Danneel*, there was a demand to annul their judgment, which appears to have been considered in connection with the injunction suit, and conceding that the plaintiff, separated in property, can attack a judgment confessed by her, and an act of mortgage made in conformity with the act of 1855, and by virtue of a certificate of a judge, the evidence of the defendants, invoked by plaintiff, satisfies us that the debt secured by the mortgage and for which she confessed judgment with stay of execution, was one for which she was held liable.

Mrs. Sarah A. Bell v. Francke & Danneel. Same v. Douglass, Sheriff, et al.

It is therefore ordered that so much of the judgment in the case of *S. A. Bell v. D. B. Douglass, sheriff, et al.*, rendered on thirty-first May, 1871, as perpetuates in part the injunction herein of the judgment in favor of *B. Silbernagel & Co.* be reversed, and that said injunction be dissolved, with twenty per cent. damages on the amount enjoined, with costs of both courts in favor of said *B. Silbernagel & Co.*, and that in other respects said judgment and the one of same date in the case of *S. A. Bell v. Francke & Danneel* be affirmed with costs.

No. 228.—STATE v. FRIDAY RILEY et al.

The Parish Court has jurisdiction to try criminal cases when the penalty is not necessarily imprisonment at hard labor or death, if the accused shall have waived trial by jury. Constitution, art. 87.

Being once vested with jurisdiction of a criminal cause the parish court has the power to pass sentence and inflict such penalty as the law prescribes.

A PPEAL from the Parish Court of Morehouse. *James Bussey*, Parish Judge. *W. W. Farmer*, District Attorney, Fourteenth Judicial District, for the State. *C. T. Dunn*, for the defendants and appellants.

HOWE, J. The accused having been indicted for larceny waived a trial by jury and were tried by the parish court, found guilty, and sentenced to imprisonment at hard labor in the penitentiary. Appealing, they admit that the parish court had jurisdiction to try their case, but not to impose a sentence of imprisonment at hard labor.

Article 87 of the Constitution declares that "in criminal matters the parish court shall have jurisdiction in all cases where the penalty is not necessarily imprisonment at hard labor or death and when the accused shall waive trial by jury."

Such was the case at bar. The offense was punishable by imprisonment with or without hard labor, and the accused waived a trial by jury. We are unable to understand how a court can have jurisdiction of a cause and at the same time be without the power to render the judgment provided by law. Jurisdiction, in the sense in which the word is here used, means the right of judging. It would have been an idle ceremony for the judge *a quo* to exercise his judicial faculty in determining whether the accused were guilty or not guilty, if he had not further proceeded to sentence them when found guilty. It is conceded that he could pass sentence. But he could only pass sentence according to law, and the law in respect to larceny accords to him a further judicial discretion to determine whether the imprisonment should be with, or without, hard labor. Between these two he had the "right of judging," and it would be just as logical to say that he had the right to commit to the penitentiary but not to the parish jail, as to say that he had a right to commit to the parish jail but not to the penitentiary.

Judgment affirmed.

No 271.—JONAS ROBESON v. JOSEPH HOWELL.

In an action of boundary of town lots, if it be shown by survey and plat of the town that certain squares have been laid out, marked and surveyed, starting from a given point with a fixed dimension in each square, and if it be shown further that certain contiguous squares have been subsequently laid off which touch and appear to run into the squares or lots first laid out, then the lots or squares last laid out, surveyed and marked must stop at the boundary line of the older surveys. And if any diminution of quantity occurs in the measurement of the lots or surveys it must be borne exclusively by those holding under the surveys last made.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Lerisee, J. Nutt & Leonard*, for plaintiff and appellant. *Looney & Wells*, for defendant and appellee.

TALIAFERRO, J. This case is before us for the third time, having been twice remanded to enable the parties to obtain additional evidence. It has been tried before the district court three times, the decision on the first trial being in favor of the plaintiff, and on the subsequent trials judgments were rendered in favor of the defendant. A large amount of evidence is in the record. The testimony of several surveyors, all of whom it appears are competent men in their line of business, and conversant with the plan of the city of Shreveport and the method used in laying out its squares and lots. Most of them have held the office of city surveyor, and one of them is now occupying that position. These men have been commissioned from time to time to make surveys in Shreveport, to determine controversies that have heretofore arisen there in regard to boundaries. They seem to have taken great pains to be accurate in their measurements and calculations in regard to the lines necessary to be ascertained and traced, in order to determine the proper limits of the lots of ground of the litigants, forming the subject of this lawsuit. They have testified orally in regard to their surveys, and the City Surveyor presents in connection with his evidence a diagram of his survey. Documentary evidence in abundance is also presented. An act of partition, notarial deeds, judicial sales as muniments of title are introduced. These are valuable auxiliaries in aid of the inquiry, as they indicate the localities of the contiguous lots of ground, if they do not accurately express their boundaries, and they show the quantity of ground the contestants bought and the periods of time at which they became owners.

With all this array of facts derived from the sources from which they have been obtained, it would seem at the first view that there could be no difficulty in adjusting the boundaries and settling the controversy between the parties. But an examination of the record with all the care we have been able to bestow upon it, admonishes us that there are difficulties in the way, for we find there are important discrepancies in the surveys of the experts from whom was mainly to be expected the data necessary to a clear and satisfactory view of the

case. The judge of the lower court, in a long and elaborate decree which he rendered in the case, points out these discrepancies and remarks:

“It seems to have been the fashion with all subsequent city surveyors to ignore the work of their predecessors.” * * * “All proceed more or less upon theory, regardless of what had previously been done. Each new measurement differing in some degree from the former, makes the lines and courses more unsettled, and the oftener the town is measured the greater will be the uncertainty as to boundaries.”

Such then is the condition of things that some degree of uncertainty may be feared in any conclusion that can be arrived at; still we think the case may be determined without prejudice to the rights of the parties, notwithstanding the obscurity and contradiction which pervade the testimony. The controversy has existed for more than ten years, and we deem it proper that it should be terminated.

The judgment of the court *a qua* was adverse to the plaintiff, and he has appealed.

The map or diagram presented in connection with his report by the City Surveyor is part of the record, and is marked H. In rendering his judgment the judge *a quo* used this map, and we shall also refer to it in the remarks we may have occasion to make in regard to lines and boundaries.

The plaintiff owns block No. 9. This block is bounded by Common street, Lake street, Louisiana street and fractional ten acre lot No. 9, owned by the defendant. The contest arises from an alleged conflict of the limits of these two lots of ground; the line claimed by the defendant as the true boundary, cutting off, as the plaintiff complains, from block No. 9, a strip of ground by which the area of that block would be materially reduced. At the point K, in the blue line K C, is a rock planted in the ground. This rock the defendant contends was placed at that point in 1843 by Hall, a surveyor, who ran off the “ten acre lots,” and that this rock indicates the point of intersection of ten acre lots six and seven, and fractional ten acre lots eight and nine. The plaintiff contends that the line B E forms the boundary between the lands of himself and the defendant, and not the line K C, as held by defendant. The judge *a quo* arrived at the conclusion that the evidence establishes that Hall planted the rock in its present position when he made the survey of the ten acre lots in 1843, and that it is the enduring monument indicating the point of intersection just mentioned. There are some facts shown that seem to favor that conclusion, and there are others that do not. The Shreveport Company, it seems, in 1843 had its lands not previously laid out in blocks and lots divided in parcels of ten acres each. Some of these lots were necessarily fractional. This work was performed it appears by Hall. But Shreveport

had been laid off as a town anterior to that time. The block No. 9, belonging to the plaintiff, had its locality fixed as a block within the town limits before Hall was called upon to lay off the ten acre lots. The dimensions of each block were fixed, to wit: three hundred and twenty feet square. Block No. 9 has well defined boundaries on three sides, as we have seen. It is not shown to have been fractional or its area less than that of the others. The width of the streets and the dimensions of the blocks are known. It is not easy to see how Hall could, after the company had laid off blocks and sold them, run off the outside lands into ten acre lots to interfere with the survey of lots previously made. That Hall did plant the rock at the point K as a land mark for any purpose, we think there may be reasonable doubt. Parsons and Watts, old and experienced surveyors, do not by any means concur in the opinion on the subject. The latter made surveys in Shreveport in 1851; the former in 1854. Watts is clear that the rock was planted by Hall as the common corner of lots six, seven, eight and nine, as the witness (Watts) verified the lines by using Hall's field notes and his courses and distances. Parsons on the other hand, in conjunction with Rafteny, another surveyor, had the field notes and map of Hall when they made a general survey of Shreveport in 1854. Again, in 1860 these surveyors found the monument somewhere about the corner of ten acre lots six and seven and fractional lots eight and nine, and Parsons says: "We had no evidence that Hall put it there. Had we been so satisfied we would have established it."

The testimony of the present City Surveyor tends, we think, to weaken the belief that the rock monument was planted at the point K to indicate the intersection of the corners of the lots six, seven, eight and nine. By Hall's map, taken from book D, the line dividing fractional sections eight and nine and that dividing sections six and seven, do not come together at the same point to form a common corner for all four of these lots. By Hall's map, Howell's fractional lots Nos. 8 and 9 call for fifteen acres and one hundred and twenty perches; the lines claimed by him are shown to embrace sixty-four perches more than that quantity, while he bought, as his deeds show, only fourteen acres. These facts are adverse to the opinion that the rock planted at the point K marks the proper corner as contended of the four sections referred to, and rather tend to produce the impression that if planted there for that purpose it was so done in error. The blue line K C passing through the point K cuts off from the plaintiff's block a strip as it seems of about the width of twenty-seven feet, and runs at an angle into the blocks lying in the same tier with that of the plaintiff; whereas the line dividing ten acre lots six and seven passing through the point B, and extended would coincide with the line forming the sides of blocks nine, ten, twenty-seven, etc. This would, as

Robeson v. Howell.

it seems to us, preserve the area and symmetry of form originally given to the blocks when the city was laid off.

It must be borne in mind that the blocks, of which the plaintiff is owner of the one numbered nine, were lots of ground laid off and having their appropriate areas and dimensions fixed several years before the division of the lands adjacent to and outside of the limits of the town as originally laid off. Many of these blocks were doubtless sold and in possession of third owners before the survey of the outside lands by Hall in 1843. The limits of the town were certainly not intended to be encroached upon by this later survey of the ten acre lots. The purchasers of blocks or lots within these limits are entitled to the quantities of ground they contain. We do not concur with the judge *a quo* that as between the litigants in this case they must be considered as having purchased *per aversionem*. For aught that appears, a proper adjustment of boundary between them may be made without taking from either his proper quantity. On this basis we believe from all that is in evidence before us the boundary may be established, and if there be a deficiency in quantity it must be sustained by the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the original dimensions and area of the block No. 9, owned by the plaintiff, be maintained by giving to each of its sides the length of three hundred and twenty feet as originally laid off, and as shown by the map or diagram in evidence, marked H; the said block being bounded on three of its sides respectively by Common, Lake and Louisiana streets; that the fourth side, to complete the square of four equal sides of the length of three hundred and twenty feet each, form the boundary between block No. 9, owned by the plaintiff, and fractional ten acre lot numbered nine, the property of the defendant. It is further ordered that defendant pay the costs of this suit.

No. 214.—STATE v. ALFRED HOLMES.

In an indictment for larceny, if an amendment correcting the name of the owner of the property stolen be allowed without objection, the trial may go on at the discretion of the judge, without a new arraignment or the jury being resworn.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. W. W. Farmer*, District Attorney, for the State. *W. J. Q. Baker*, for defendant and appellant.

HOWE, J. The defendant who has appealed in this case was indicted for the larceny of property belonging to *Sanford Green*. It appearing on the trial that the real name of the owner was *Sampson Green*, the District Attorney moved to amend accordingly. The amendment was

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allowed, the defendant making no objection. The jury then rendered a verdict of guilty, and the defendant, having been sentenced to imprisonment at hard labor, has appealed.

The appellant makes the point that the amendment having been allowed, it was indispensable that a new arraignment should be had and a new jury sworn, or at least the same jury resworn. He did not ask for any of these formalities at the time, but he claims that it was the duty of the State to have provided them, and that the omission was fatal.

We are unable to assent to this view. The amendment was proper. R. S. section 1047. The court had a discretion to proceed with the trial before the same jury; and the statute expressly declares that, when so proceeded with, it shall be conducted "in the same manner in all respects as if no such variance had occurred or amendment been made."

Judgment affirmed.

No. 270.—L. D. ARICK v. WALSH & BOISSEAU et al.

A lessor has a superior right to the proceeds of the sale under execution of cotton, mules and other property on the leased premises, for the payment of the rent, to that of the seizing creditor.

The lessor may take the movable effects found on the leased premises into his actual possession, and retain them until the rent is paid. This right of pledge which the lessor has accorded to him by law on the movables on the premises leased, need not be registered to preserve it.

When, therefore, as in the present case, a judgment creditor of the lessee seizes and sells the movable effects on the leased premises, the lessor has the preference on the proceeds of the sale over that of the seizing creditor for the payment of the rent, without reference to whether the pledge in favor of the lessor of the movables on the premises leased has been registered or not.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Land & Taylor*, for plaintiff and appellant. *Nutt & Leonard*, for defendants and appellees.

LUDELING, C. J. The only question for decision in this case is whether a lessor who has not recorded his lease has a better right to the proceeds of cotton, mules, etc., on the leased premises, sold under execution, than the seizing creditor, who has not himself registered his seizure. Article 3218 of the Civil Code declares that "the right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid." This right of pledge need not be registered to preserve it. There is no law which requires its registry, nor does the

 Arick v. Walsh & Boisseau et al.

reason of the law which requires privileges to be registered, apply to the rights of the lessor. Every one is presumed to know that the products and movables found on a leased place are pledged for the payment of the rents, and whoever deals with the lessee, does it at his risk. The possession of the lessee is that of the lessor. C. C. 3433. And the sheriff could not lawfully take away the property without first satisfying the lessor's claim for rents. 5 An. 111.

On the other hand, the right which the seizing creditor acquires by his seizure to be paid in preference to all others who have not at the time of his seizure a mortgage lien or privilege, results solely from his superior diligence. It does not spring from the nature of his debt, nor does it inhere in the debt, for the right exists only while the seizure is maintained. This right of the seizing creditor can not defeat rights existing at the time of and prior to the seizure. 7 An. 1.

It is therefore ordered and adjudged that the judgment of the court of the first instance be avoided and reversed, and that there be judgment in favor of the plaintiff, perpetuating the injunction and recognizing his superior right on the proceeds of the property sold under the execution of the defendants to the extent of his rents, and that defendants pay costs of both courts.

No. 276.—STATE OF LOUISIANA ex rel. etc. v. J. B. GILMORE et al.

In a contest for the right to an office under the intrusion act, No. 156 of 1868, the defendant has accorded to him the right to a trial by jury, if he asks for the same in the answer to the suit. If he file an exception to the action which is afterward adjudged to be an answer, he may still file an amended answer asking for a jury. But if the question of the character of the exception be not determined until the trial of the cause, and it then be held that it is an answer, the defendant is not thereby deprived of the right to a trial by jury which he has prayed for in the answer.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. J. S. Ashton*, District Attorney, *Land & Taylor* and *R. J. Looney*, for plaintiffs and appellees. *Egan, Williamson & Wise*, for defendants and appellants.

LUDELING, C. J. This is a contest for office under act No. 156 of the General Assembly of 1868.

The defendants prayed for a trial by jury, which was refused by the judge *a quo* because he thought the application was made too late, and because the defendants had not asked when first notified of the suit for a special jury to be summoned.

We think the judge erred in refusing the jury. Whether the exception filed could have been regarded as an answer or not, it was treated as an exception, and the defendant was allowed to file an answer, in which he asked for a jury. If, at the time the exception was filed, it had been held by the court to be an answer, defendants might still

State ex rel. etc. v. Gilmore et al.

have filed an amended answer asking for a jury, and we do not think they lost that right, because it was not decided that the exception was substantially an answer, until much later in the proceedings. State ex rel. v. Head, 21 An. The act, under which the relators are proceeding, accords the defendants the right to a trial by jury, and we do not think they have waived it.

It is therefore ordered that the judgment of the court *a qua* be reversed, and that the cause be remanded to be proceeded with according to law.

No. 264.—WELLS & JONES et al. v. CALDWELL & COX et al.

Where, in an action of boundary between certain lot owners in the city of Shreveport, a survey has been made by the city surveyor, and by other surveyors who differ with the city surveyor in their marks and lines, and the weight of the testimony is in favor of the correctness of the survey, marks and lines made by the city surveyor, then and in such case judgment will be given in favor of the boundaries established by the city surveyor.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisce, J. Wells & Jones*, for plaintiffs and appellees. *Nutt & Leonard* and *R. J. Looney*, for defendants and appellants.

TALIAFERRO, J. This is an action of boundary. It involves the settlement of the proper boundaries between the ten-acre lots numbered 32, 33 and 34, in the city of Shreveport.

The plaintiffs allege that the boundaries between these lots, as fixed by Hall in the year 1843, under authority of the original Shreveport Company, are no longer to be seen, and in consequence the adjacent proprietors have encroached upon their lot, No. 33, and that it becomes necessary that the proper limits between the lots named should be fixed anew.

The defendants deny these allegations, and say there is no loss or obliteration of boundaries between the lots in question, but, on the contrary, that they are clear, distinct and well defined; that these boundaries have been for years recognized by the city authorities and the owners of adjacent lots. They aver that the centre line of Sprague street, at its intersection with Common street, has from time immemorial been recognized as the starting point of the surveys of the ten-acre lots of Shreveport, and established by forty years' usage and undisputed until now by the plaintiffs. The defendants annex to and make part of their answer the survey and report of W. R. Devoe, the city surveyor of Shreveport, who, together with H. Watts and F. P. Leavenworth, surveyors, were appointed by the court to make surveys of the disputed limits and return a *procès verbal* of their work.

The separate survey and report of the city surveyor, relied upon by defendants and made part of their answer, is marked C. The other experts presented a report, which is in evidence.

Wells & Jones et al. v. Caldwell & Cox et al.

The judgment of the lower court, predicated upon the report of Watts and Leavenworth, was rendered in favor of the plaintiffs, and the defendants have appealed.

A difference of opinion arose between the surveyors in regard to the essential matter of the true starting point, two of them adopting what is called the "rock corner," recognized by some as an ancient landmark of Hall, the surveyor, in 1843, of the ten-acre lots. The city surveyor, on the other hand, adopts the point of intersection of the centre line of Sprague street with Common street.

We had occasion to examine recently, in the case of Robeson v. Howell, a mass of evidence on a question of boundary which involved both the authenticity and the accuracy of the point called the "rock corner," as indicating the true corner of the ten-acre lots six and seven and the fractional lots fourteen and fifteen. We came to the conclusion that it was not so established. The evidence in the present case tends to strengthen us in that opinion and to conclude that the survey made by the city surveyor and appended to the defendants' answer, should be adopted, and the boundaries between the litigants in this case be thereby established.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the boundaries between the ten-acre lots numbered 32, 33 and 34 be established as ascertained by the lines run, marked and designated by William R. Devoe, city surveyor of Shreveport, and displayed and expressed in his map of survey and report accompanying the same, and which are filed in evidence in this case. It is further ordered that the plaintiffs pay costs of this suit.

No. 241.—H. McFARLAND v. E. K. Russ, Sheriff, et al.

Where several writs of attachment have issued from inferior jurisdictions, each for an amount less than that required to give the District Court jurisdiction, and the sheriff levies upon and seizes a certain piece of property, or a lot of cotton, all of which is claimed by a third party, if the value of such cotton thus attached by virtue of the several writs amounts to a sum above five hundred dollars, then and in such case the ownership of the cotton being the question at issue, the District Court has jurisdiction.

APPEAL from the Tenth Judicial District Court, parish of Bossier. *Levisse, J. J. D. Watkins & S. L. B. Watkins*, for plaintiff and appellant. *T. M. Fort*, for defendant and appellee.

HOWELL, J. The main question in this case is one of jurisdiction. Under several writs of attachment issued from the parish court and the court of a justice of the peace the sheriff levied upon certain cotton in the gin house of the plaintiff, who enjoined and claimed to be the owner, alleging the said cotton to be worth \$1500.

McFarland v. Russ, Sheriff, et al.

The defendant Connell, plaintiff in the seizures, excepted to the jurisdiction of the district court on the ground that the returns of the sheriff show that the value of the cotton seized in each case is less than \$500.

This fact does not control the jurisdiction. The plaintiff claims to be the owner of all the property seized, and the issue presented is his title to or ownership of the same, the value of which is alleged and shown to be above \$500. It is this matter in dispute that fixes the jurisdiction. The court below therefore erred in sustaining the exception.

On the merits there is no serious controversy. The evidence establishes the title to the cotton to be in plaintiff.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of plaintiff perpetuating the injunction herein, with costs in both courts.

No. 178.—THE STATE OF LOUISIANA v. JOLLY GASTING.

The notes or bills issued by the National Banks of the United States, which are authorized by law to circulate throughout the Union as a medium of trade, are included in the phrase "United States currency."

Larceny of such notes is therefore larceny of United States currency.

A PPEAL from the Eleventh Judicial District Court, parish of Union.
Egan, J. W. W. Farmer, District Attorney of the Fourteenth Judicial District, for the State. *J. & J. W. Young* for defendant and appellant.

HOWE, J. The defendant was indicted for larceny of ten dollars in "United States currency," ten dollars in gold coin, and ten dollars in silver coin. He was tried, convicted, sentenced to hard labor, and has appealed.

The only question presented is raised by the defendant's bill of exceptions, and is substantially whether notes or bills of national banks are included properly in the phrase "United States currency."

The act of Congress by which the associations known as National Banks were authorized, is entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and its title seems to be a correct index to its contents. The notes or bills issued are not only receivable at par, in all parts of the United States, in payment of taxes, excises, public lands and all other dues to the United States (except for duties on imports), but also they are a legal tender for all salaries and other debts and demands owing by the United States to individuals, corporations and associations within the United States, (except interest on the public debt). Laws of 1863, p. 670, § 20.

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They are prepared by the officers of the Treasury and bear their engraved signatures and seal. The words "National Currency" are emblazoned conspicuously upon them, being derived evidently from the title of the act. They circulate in all parts of the Union, being every where received at par as a medium of trade, without regard to the local domicile of the associations, respectively.

Currency may be properly defined as something which circulates as a medium of trade. It conveys at the present time the idea of paper money, of some sort. National currency is that which is issued under the sanction of a nation. The nation which authorizes the issue of what we term national bank notes is the United States. Considering therefore the title and terms of the act of February 25, 1863, above cited, in connection with these familiar definitions, we think it fair to decide that the phrase "United States Currency" includes the "national currency" authorized by the United States—declared to be for many important purposes a lawful tender—and designed to circulate as a medium of trade in all parts of our country.

Judgment affirmed.

No. 265.—GEORGALINE HASTINGS v. REBECCA BRANTLEY, Executrix,
et als.

A judicial sale of cotton made during the late war, while Confederate notes was the only currency in circulation at the place where it was made, is protected by article 149 of the Constitution of 1868. Such a sale is not therefore void because the price bid and paid into the hands of the sheriff by the purchaser was Confederate Treasury notes.

A APPEAL from the Tenth Judicial District Court, parish of DeSoto. *Lerisee, J. Elam & Wemple* for plaintiff and appellant. *T. T. & A. D. Land* for defendant and appellee.

LUDELING, C. J. Harris Brantley died in April, 1863, leaving a last will and testament, by which he constituted his wife legatee of a portion of his property, and appointed her executrix of his succession.

The will was duly probated and the executrix confirmed, and duly qualified.

On the eleventh February, 1864, Rebecca Brantley, executrix, prayed for the sale of the movables of the succession, including seventy thousand pounds of cotton in the seed, *more or less*, and ten bales of ginned cotton, in order to pay debts. The order was granted directing the property to be sold for cash, at the appraisement, on the seventeenth March, 1864, and a commission or execution was issued to J. W. Elam, sheriff, to make the sale. After having complied with the formalities of the law, the sheriff adjudicated to Jules Tardos seventy thousand pounds of cotton in the seed, *more or less*, for seven thousand six hundred and fifty dollars, and ten bales of cotton in the lint for one thousand eight hundred dollars.

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The procès verbal recites that "it was announced by me, sheriff, that the lot of cotton offered in the seed was estimated at seventy thousand pounds, more or less, but in the event the cotton should be burnt or destroyed, before it was weighed, the purchaser should be bound to pay for said seventy thousand pounds; and the cotton in the lint, ten bales, the purchaser to pay for ten bales, averaging four hundred and fifty pounds per bale."

The sale was made for Confederate money, the only currency then in circulation in that part of the country, and the price was paid to the executrix. The oral evidence and the procès verbal show that the cotton was sold in a lump, and the price was paid. The sale was perfect. C. C. 2459, 2478.

It was an executed judicial sale, which is protected by article 149 of the Constitution. See *Lee v. Taylor*, 21 An.; *Allen v. Cutliff et al.*; and *Heirs of Brown v. Jacob*, 23 An.

The claim of the plaintiff to the cotton or its proceeds, predicated upon the supposed nullity of the judicial sale, is unfounded.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal. /

No. 253.—SUCCESSION OF WILLIAM ARICK, in Opposition to Tableau of Debts.

The inferior court is bound to confine its examination of a cause that has been remanded to the questions that have not been finally passed upon by the appellate court.

A due bill for money can not be compensated by a conditional obligation or liability of a surety on an administrator's bond.

APPEAL from the Parish Court of Bossier. *Baker*, parish judge. *T. M. Fort*, for the heirs appellees. *J. D. Watkins*, for opponents and appellants. *Griffin & Snider*, and *Richard W. Turner*, for intervenor and appellant.

Howe, J. This cause was before this court in July, 1870. 22 An. 501. It was then finally decided as to all items of the tableau save one—item No. 8—and was remanded for the sole purpose of deciding the amount of credits due on that item.

Instead of confining the contest to the point thus indicated the judge *a quo* permitted certain heirs, who in the contest before us had been represented by the attorney of absent heirs to come in and dispute item No. 7, which had been finally homologated by this court. 22 An. p. 503, 504.

In this we think the judge *a quo* erred. The heirs were represented before us, the only defense made against item No. 7 was decided adversely to their views, and the judgement upon it was final.

The judge *a quo* then permitted the item No. 8, a due bill, to be com-

pensated by an alleged claim of the succession, or its heirs, against Stinson, the holder of the bill, which claim is founded upon the fact that Stinson was surety on the official bond of a former administrator of this succession, and the allegation that the said administrator was indebted to the succession. We apprehend that this ruling was erroneous. A written due bill, or promise to pay a certain sum, ought not to be compensated by a conditional obligation like that of Stinson as surety.

Considering that the item No. 7 was finally adjudged last year to be a valid and subsisting debt of the succession in favor of its holder, Stinson, we have only to consider, as already stated, the credits due on the item No. 8. In addition to the credit thereon indorsed February 1, 1859, of \$5,942 99, which is a settlement up to that date, and behind which we will not inquire, we find that the succession is entitled to a further credit of \$1,490 12, as of June 1, 1859.

It is therefore ordered that the judgment appealed from be reversed. It is further ordered that the item No. 8 on said tableau of debts, to wit: a due bill of \$13,743 10, dated March 8, 1858, reduced by a credit of \$5,942 99, as of February 1, 1859, and the further credit of \$1,490 12, as of June 1, 1859, be homologated and decreed a valid and subsisting debt of this succession, jointly with B. F. Looney, in favor of R. T. Stinson, and the said succession liable for the one-half of the balance due thereon with interest at five per cent. per annum, to be paid in due course of administration, and that the appellees pay costs of appeal.

NO. 230.—E. W. WARFIELD et al. v. G. W. OLIVER.

If the suit be commenced before the entire obligations sued upon are due, but such obligations become due before judgment, the court may, in its discretion, allow an amendment of the pleadings so as to cover the whole demand.

The lessor has, as a security for the payment of the rent and the other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased. The obligation by the lessee to repair and to keep in repair the premises leased, gives the lessor a right of pledge on the movables of the lessee found on the place for its faithful performance.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Garrett & Garrett, R. W. Richardson and W. J. Q. Baker*, for plaintiffs and appellees. *Stubbs & Cobb* for defendant and appellant.

HOWE, J. This was an action to enforce the obligations of a plantation lease executed by the defendant as lessee. A writ of sequestration was issued. There was a judgment in favor of plaintiffs, and defendant appealed.

First—The defendant filed an exception to the prematurity of the action begun December 15, 1870, because a portion of the claim for

23	613
46	481
23	612
49	944

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rent was not then due, and did not become due till December 31, 1870. On the eleventh of April, 1871, the exception was sustained, with leave, however, to amend, it appearing that the rent, nearly due when suit was begun, was now long past due, and the amendment was made and issue joined thereon. We see no error, but good sense and justice in this permission to amend. 4 An. 184; 17 La. 212. The case differs from *Catlett v. Heffner*, lately decided.

Second—The defendant moved to dissolve the writ of sequestration on the grounds that there was no privilege for the claim of \$5000 for the non-performance of the obligations of the lease (other than that to pay rent), the same being for damages unliquidated; that the claim for rent depended, by the terms of the lease, on a potestative condition, not yet fulfilled, and that the allegations in the affidavit were untrue. We think the motion was properly overruled. As to the first ground, the lessor has, for the payment of his rent and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased. Rev. C. C. 2705. The "other obligations" of this lease involved in this discussion sprung from Oliver's agreement in that instrument to put the plantation in repair and to keep it in repair. As will be seen by the evidence in the record, this obligation was of great importance, and we see no reason to decide that it is not secured by the right of pledge above mentioned.

As for the second ground, it appears that by the lease the rent was fixed at six dollars per acre, and the exact number of acres was to be ascertained by "survey." This word "survey," it is claimed, means the survey mentioned in article 823 *et seq.* Rev. C. C., and such a survey not having been made, the rent is not due. We do not suppose this argument is made with entire seriousness, or that we shall be expected to reply to it at great length. It seems clear that the survey here provided meant an accurate measurement, in order that the amount due might be made mathematically certain.

The last ground refers to the merits.

Third—Upon the merits, we are not prepared to say that there was error in the judgment. It was provided by the lease that the amount expended by the defendant in making certain improvements should be credited on the rent; but the judge *a quo* gave judgment for the rent, and compensated the claims of defendant for improvements made with the amount found due to plaintiffs for the non-performance of the other obligations of the lease. It may well be that the method adopted by the judge below was erroneous, but if the conclusion he reached was accurate in amount, it being a money judgment merely, and both branches of the plaintiffs' claim being privileged, the error of method would furnish no reason for a reversal. We are of opinion that the amount of the judgment is correct.

Judgment affirmed.

M. P. G. Allen, Executrix, v. M. S. Cutliff and Husband.

No. 132.—M. P. G. ALLEN, Executrix, v. M. S. CUTLIFF AND HUSBAND.

The purchaser of real property at a succession sale, during the late war, is protected in his title and ownership thereto by the provisions of article 149 of the constitution of 1868, if it appear that all the proceedings in regard to the sale of the property were upon their face regular.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisee, J. Robert J. Looney*, for plaintiff and appellant. *S. L. Taylor*, for defendants and appellees.

TALIAFERRO, J. The plaintiff, as executrix of her husband, James S. Allen, deceased, sues the defendants to recover two town lots, with the valuable buildings and improvements upon them, constituting what was formerly known as the "Commercial Hotel," but now called the "Brooks House," situated in Shreveport, on lots eleven and twelve, in block No. forty-nine, on Milam street.

The petitioner sets out that on the ninth of December, 1863, her son, Henry E. Allen, without her authority or consent, made an application for and obtained an order of court for the sale of the property mentioned in her petition, and that on the sixth of February, 1864, under this order, the property was sold for cash and purchased by Mildred S. Cutliff, one of the defendants, at the price of \$17,600, which has never been paid, nor any part thereof, to any person legally authorized to receive it; and she avers that if any pretended payment has been made of the price specified it was made in Confederate States treasury notes, and to H. E. Allen, who had no authority to receive it. She specially denies ever having given him a power of attorney to act in these matters. She repudiates all his acts pretended to be done under her authorization. She avers that the calling of the family meeting to authorize the sale of the minor's interest in the property, and all their acts in relation thereto, and especially their recommendation to invest the minor's share of the proceeds of sale in Confederate bonds, are utterly null and void. That the court was without right to homologate the proceedings. She avers defendants have had the use and enjoyment of the property since the first of May, 1865, and that the revenues of it are worth \$525 per month. She prays citation and judgment annulling the aforesaid proceedings of the family meeting and the order of court homologating the same, and the decree of the court ordering the sale. She prays in the alternative that the property sued for be decreed to belong to the succession of James S. Allen, deceased, and that petitioner be put in possession of it, and that she recover from the defendants \$21,525 rents and revenues thereof; or, that she have judgment against the defendants for the sum of \$17,600, the unpaid price of said property, with five per cent. interest per annum from sixth February, 1864, with the vendor's lien on the said property

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as security for the payment of the price and for costs and general relief.

The answer admits possession of the property since the sixth of February, 1864, under a title good and sufficient in law. The defendants then detail the facts and circumstances under which the purchase was made, and which are substantially the same as those set forth in the petition, with this difference, that the defendants aver that all the proceedings were regular and legal. They allege that those proceedings were commenced and completed with the plaintiff's approbation and consent, or that at any rate she subsequently ratified and approved them, and can not now impeach their validity. They allege that they have made improvements and repairs on the premises worth \$10,000. For these repairs and improvements in case of eviction they claim \$10,000 with interest, and also if evicted the plaintiff and Henry E. Allen are bound in warranty to refund the purchase price. They pray the plaintiff's demand be rejected; that they be quieted in their title and possession; that in the event judgment be rendered against them they recover \$17,600 with interest, and the further sum of \$10,000 with interest and costs.

Judgment was rendered in the court below in favor of the defendant, Mildred S. Cutliff, recognizing her title and quieting her in possession of the property.

The plaintiff prosecutes this appeal.

It appears that early in the summer of the year 1857 James S. Allen died in the parish of Caddo, leaving an estate appraised at about \$30,000, and leaving a will by which his widow, the present plaintiff, was appointed executrix. She qualified in that capacity, and also as tutrix of her two minor children, the heirs of the decedent. It is in evidence that about May, 1858, the widow removed to the State of Virginia, and it is not shown that she has ever been in Louisiana since. Shortly before leaving she appointed L. M. Nutt, an attorney at law of Shreveport, her agent and attorney in fact, clothing him with ample powers, general and special, to represent her in her capacity of executrix. It appears from the record that on the twenty-seventh of March, 1860, her attorney filed a petition in her name setting forth the propriety of having the property which is the subject of this controversy sold, and prayed an order for the convocation of a family meeting to take the matter under consideration, and advise accordingly. A meeting assembled, advised the sale and prescribed the terms. The proceedings were homologated by order of court and a decree rendered on the eighteenth of April, 1860, for sale of the property in conformity with the terms fixed. Nothing further was ever done in the matter. On the ninth of December, 1863, a petition of the same purport was filed in the District Court of the parish of Caddo by Henry E. Allen,

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one of the heirs of James S. Allen, now become of age, and who professed to act in the name of his mother in her capacity of executrix, and signed his name as attorney in fact. A family meeting was called, and it advised the sale as a matter of advantage to the remaining minor, and directed that after payment of debts the portion of the proceeds coming to the minor should be vested in other real estate or in Confederate States bonds. The proceedings were duly homologated, the sale ordered, and the property sold for cash under benefit of appraisement on the sixth of February, 1864. The appraisement was made on the twenty-third of December, 1863. The valuation was \$10,000. The property was sold for \$17,600, and paid in Confederate money. No power of attorney from the executrix to Henry Allen was ever seen. He himself, on the stand as a witness, stated that in the absence of Mr. Nutt, the agent and attorney in fact of his mother, he had assumed the responsibility and carried through the business without the consent or knowledge of his mother, the executrix. Nutt, the attorney in fact, testified that the power of attorney given to him by the executrix had never been revoked. That before the war he had permitted Henry E. Allen, the person who had provoked the sale in question, to collect rents, pay bills and hire the negroes. This witness, it seems, was absent when the sale was made, and knew nothing of it until after it had taken place. In this case the proceedings in regard to the sale of the succession property were upon their face regular. The purchaser appears to have acted in good faith. The estate was much in debt. Heavy liabilities were at the time of the sale still hanging over it, and on account of which, as we have seen, the executrix and tutrix in 1860 had convoked a family meeting to advise in relation to a sale of property to provide means of payment. It is shown that Henry E. Allen, the pretended attorney in fact and one of the heirs, paid a large amount of this indebtedness. An order of court was rendered for the sale of the property; the sale was duly advertised and made in conformity with the order. This should protect the purchaser in good faith. The purchaser paid the price in such currency as was then prevalent when the sale was made, and she went into possession of the property. Under this state of facts we think this purchase at a judicial sale, clothed with all the legal formalities, made in good faith, accompanied by the payment of the price of adjudication, and delivery and possession of the property, constituted an executed contract intended to be made valid by article 149 of the constitution. *Lee v. Taylor*, 21 An., p. 514.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Rehearing refused.

No. 240.—JAMES D. McENERY, Tutor, etc., v. WILLIAM H. LETCHFORD Co. et al.

If the property of the minor has been seized by a judgment creditor of the tutor in his individual capacity as the tutor's individual property, the tutor is the proper party to enjoin the sale thereof in behalf of the minor. If, however, the question of the validity of the minor's title to the property becomes the subject of adjudication, then the under-tutor is the proper party to bring the suit.

Where the title to property is ostensibly in the minors, a judgment creditor of the tutor in his individual capacity can not maintain a seizure thereof on the ground that the tutor is in possession, unless he allege that the title of the minors is simulated. In such a case the judgment creditor must first resort to a revocatory action.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *W. J. Q. Baker*, Attorney at Law, Judge *ad hoc*. *Isaiah Garrett*, for plaintiffs and appellees. *John Ray*, for defendants and appellants.

HOWE, J. The plaintiff, as tutor of his minor children, enjoined the sale of certain lands and immovables by destination thereto attached upon the allegation that they were the property of the minors, but had been seized under judgments in favor of the defendants against M. T. Mason, James D. McEnery and S. Weil & Bro. We find it necessary to consider but two points :

First—The defendants except to the right of the plaintiff, James D. McEnery, to stand in judgment on the ground that the executions enjoined in this case were issued against him personally, and that if the property should be sold the funds would go to pay his debts, a fact which creates in him an interest opposed to that of the minors and makes it necessary that the under tutor should be a party plaintiff. They cite in support of this view C. C. 301; 2 La. 146; 11 La. 189; 7 R. 169; 2 An. 960. The exception was overruled, and they filed a general denial merely. The court *a qua* gave judgment perpetuating the injunction and quieting the minors in their title and possession of the property described in the petition. We think there is some force in the exception, so far as the demand of the plaintiff that the minors be quieted in their title is concerned. To do that we think it would be more regular to require the under tutor to be present as a party, so that the minors might be bound in case the defendants should be successful.

But so far as the demand for an injunction against the seizures complained of is concerned, we think in this case the tutor alone can stand in judgment. It would be a vain thing, therefore, to dismiss or remand when we perceive that the plaintiff is entitled to a part of the relief prayed for, and such part will answer the purpose he has in view. The minors, in this case, are in possession under a title ostensibly valid and recorded in 1860. The defendants disregard this title and proceed by direct seizure in 1867. They do not allege simula-

tion. Their answer is a general denial. There is not a whisper in the record against the good faith and reality of the minors' title and the fiduciary character of the possession of the plaintiff, their tutor. The record presents a bald case of seizure of what is ostensibly the property of the minors, without any revocatory action. It seems clear that under such circumstances the tutor, whom the law endows with the possession and charges with the administration of the minors' estate, has a right to enjoin such a seizure and compel the creditors to resort to a proper action.

Second—As already stated there was no charge of simulation in the pleadings, and it is not necessary to discuss alleged informalities in the minors' title. We think, on the merits, that the injunction should be perpetuated, but the question of title of the minors left open as the subject of a direct action if the same be deemed desirable.

It is therefore ordered that the judgment appealed from, so far as it perpetuates the injunction issued herein, with costs of the lower court, be affirmed, and in other respects reversed; and that appellee pay the costs of appeal.

Ludeling, C. J., recused

No. 204.—CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA v. JAMES W. MASON et als.

If the judge *a quo* has omitted or failed to sign a judgment dismissing the action on exception filed by the defendant, such failure or omission will not authorize the plaintiff to abandon the suit, because the plaintiff or defendant may have such judgment signed by the presiding judge.

A judgment dismissing the suit on exceptions filed by the defendant is a final judgment against the plaintiff, and forms *res judicata* as between the parties to the action.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiffs and appellants. *Stubbs & Cobb*, and *Richardson & McEnery*, for defendants and appellees.

LUDELING, C. J. This is an hypothecary action to enforce the stock mortgage executed by Mason and wife against property in the possession of the estate of J. Hart and of E. Tisdale, and for a personal judgment against the estate of Mason.

The defendants filed the following exception: "That on the twenty-eighth day of October, 1868, plaintiff filed in your honorable court a suit entitled 'Consolidated Association v. J. W. Mason's Estate,' No. 800 on the docket thereof, plaintiffs in said petition being the same, defendants the same and the cause of action the same, which said suit was dismissed at plaintiffs' costs on peremptory exception filed therein by James Hart, third possessor of the alleged mortgaged property, by Hon. Thomas H. Crawford, judge of said court, on the eleventh of September, 1869, as will appear by reference to the record of said suit.

hereto annexed and made a part hereof. Your appearers allege that said judgment so dismissing plaintiffs' action is as to said succession and all parties holding under it, *final* and *res judicata*. Whereupon they pray that as to the estate of Hart and all those holding titles under it to said property, plaintiffs' petition be dismissed and for general relief, etc."

The record before us shows substantially the following facts

That the plaintiff, defendants and the cause of action are the same in suit No. 800 of the docket of the District Court of the parish of Ouachita, and in this case. That in the former suit Hart for himself and his vendee, Tisdale, filed the following exception

"That the land and immovables now owned by this appearer and the portion sold by him to Tisdale, now sought by plaintiffs to be held subject to their mortgage against Mason, is not and never has been subject to said mortgage in the hands of this appearer or any third person, for the reason that said immovable has never been precisely described as to its situation in the act of conventional mortgage attached to plaintiffs' petition as required by law. *Second*. That the record of the mortgage sought to be enforced by plaintiffs in this case is unconstitutional, null and void, and not binding on this appearer or any third person, for this, that the public act of mortgage sought by plaintiffs to be enforced in this case is and has ever been in the French language, and not in the language in which the constitution of the United States is written, contrary to the constitution and laws of this State." And the estate of Mason filed the following exception: "That the charter of the bank of the Consolidated Association has been declared by law forfeited, and that the president and directors of said bank, whose petition defendant is called upon to answer, are without authority to sue and can not stand in judgment."

That these exceptions were argued and taken under advisement on the eighth and ninth day of September, 1869, and on the eleventh of September, 1869, the following entry was made in the minutes of the court: "Judgment—Exceptions filed by all the parties sustained, and the suit dismissed."

No other judgment appears in the record, nor is its absence explained in the record. Subsequently an appeal was prayed for, an order of appeal was granted, bond was given, and the appellees were cited; but the transcript was never filed in this court, which fact appears from the certificate of the clerk of this court given to the appellees.

The judge *a quo* sustained the plea of *res judicata*, and the plaintiffs have appealed. It is contended that the judicial admission of the plaintiffs in their petition for an appeal estops them from now denying that there was a *final* judgment in suit No. 800. We do not think so. If the judgment was not written up and signed, and the plaintiffs'

attorneys by some oversight applied for an appeal prematurely, we can not think that their clients are forever after concluded by this mistake. Neither are we prepared to say that the judgment was not signed; everything in the record before us, except the absence of the judgment itself, tends to show that there was such a judgment, and there is no evidence to show it was not signed. But even if the judgment was not signed, and, therefore, if it did not *technically* constitute *res judicata*, still we believe that the exception to the new suit should be maintained and the suit should be dismissed, because the proof in this record shows that suit No. 800 was tried and decided. If it is not a *final judgment*, it is because of the neglect of the judge *a quo* to sign it, and either party has the right to have that judgment signed by the presiding judge. It would be inequitable and harassing to defendants to permit plaintiffs to abandon their suits after a judgment had been pronounced against them, and to institute new proceedings for the same cause of action by failing to have the judgment signed.

The plaintiffs insist that the judgment is not *res judicata* because it dismissed the suit. The extract from the minutes shows that "the exceptions filed by all the parties are *sustained* and suit dismissed." This was a judgment in favor of defendants, and though it dismissed the suit, it was not a *nonsuit*. It decided that the pretensions of the plaintiffs were illegal, null and void.

It is therefore ordered and adjudged that the judgment of the District Judge be affirmed with costs.

No. 222.—THE STATE OF LOUISIANA v. TONEY VESTER.

The objection by the accused that he was not served with a correct list of the jury that was to try him comes too late if not made until after verdict. It cannot be entertained if made for the first time by a motion in arrest of judgment.

APPEAL from the Tenth Judicial District Court, parish of Madison. *Hough, J.* *W. W. Farmer*, District Attorney Fourteenth Judicial District, for the State. *H. P. Wells*, for defendant and appellant.

Howe, J. The defendant having been found guilty of manslaughter and sentenced to imprisonment at hard labor, has appealed. The only point he makes is one which was made in the court below for the first time on a motion in arrest of judgment. It is that he was not served with a correct list of the jury that was to try him, as required by statute. This was a right created for his benefit and which he was competent to waive *in toto*, and which has often been held to be waived if not claimed before trial. 2 An. 732; 6 An. 690; 12 An. 679; 14 An. 667. If a want of the service of any of the list at all may be cured by want of objection and verdict, *a fortiori*, may remedy such a defect as an imperfect list

Judgment affirmed.

Ross v. Adams.

No. 180.—A. M. ROSS v. HARVEY ADAMS.

A renunciation of prescription after it has been acquired must be express. A written proposition by the maker of the note, after prescription has been acquired, to take out a life insurance policy in favor of the holder is not such an acknowledgment of the debt as the law requires to establish a renunciation of an acquired prescription.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiff and appellant. *Todd & Brigham*, for defendant and appellee.

Howe, J. Action on a promissory note due in 1860; citation served in 1870; plea of prescription of five years; judgment for defendant and appeal by plaintiff.

The plaintiff sought to prove a renunciation of acquired prescription by the following letter:

“FEBRUARY 7, 1869.

“Mr. A. Ross:

“I will take out a life insurance in your favor on a ten annual payment if that will suit you. Come and see me or make an agent in Bastrop, and I will promptly attend the business. For the sum of money that I will be able to pay you *only (annually?)* it wouldn't pay you to come after it. Yours, etc., HARVEY ADAMS.”

In connection with this it appeared that the defendant had never owed the plaintiff any debt but the one declared upon.

We can not think that this letter furnishes the written evidence which, under the statute of 1858, is necessary to establish a renunciation of an acquired prescription. It contains no express renunciation nor any promise to pay the debt in suit.

Judgment affirmed.

No. 226.—THE STATE OF LOUISIANA v. ROMEO AXIOM.

The objection by the accused that he was not served with a correct jury list comes too late, if not made until after verdict.

A clerical error in the minutes of the court by which the name of a grand juror has been incorrectly spelled may be corrected *nunc pro tunc*, so as to correspond with the names on the venire. Such discrepancy, if corrected, is not good ground for a new trial. 2 An. 745; An. 94; 10 An. 198.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. W. W. Farmer*, District Attorney Fourteenth Judicial District, for the State. *J. C. Seale*, for defendant and appellant.

Howe, J. The defendant having been convicted of manslaughter and sentenced accordingly has appealed and presents two points:

First—That he was not served with a correct jury list. This point, made for the first time after verdict, came too late. *State v. Vester*, lately decided; 23 An. —; *State v. Clark*, 23 An. 194.

Second—That Moses Brockett who appeared by the clerk's minutes, at the time the motion for a new trial was made, to have been impaneled as a grand juror, was not on the *venire* of jurors, was not a registered voter of the parish, and was not a competent juror. It might have been added, probably with equal truth, that there was no such person in being. For it plainly appears that the name Brockett in the minutes was a clerical error for Crockett; that Moses Crockett was on the *venire*, was impaneled on the grand jury, and was a competent juror; and that this error was duly corrected, so that the minutes now show the true fact and not the fiction behind which the appellant seeks to take shelter. This correction of the minutes was properly made. 2 An. 745; 9 An. 94; 10 An. 193

Judgment affirmed.

No. 279.—STATE OF LOUISIANA ex rel. NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY v. JAMES GRAHAM, Auditor, et al.

The act of the General Assembly of Louisiana, approved February 21, 1870, extending the aid of the State to the New Orleans, Mobile and Texas Railroad Company, is a contract between the State and the company. In granting State aid to this company to enable it to construct the road through her limits, the Legislature was evidently influenced from motives of public policy, and the aid given can not therefore be regarded as a simple donation to a private company.

The effect of the third amendment to the Constitution of the State, which forbids the increase of the State debt beyond the sum of twenty-five millions of dollars, is not retroactive. The Legislature granted the State aid to the New Orleans, Mobile and Texas Railroad Company from motives of public policy before the adoption of the third amendment to the Constitution, limiting the State indebtedness.

Held—That this grant of State aid, being a contract with the company which was made before the amendment to the Constitution was adopted prohibiting the increase of the State debt above twenty-five millions of dollars, and being made in the public interest, this aid can not now be withheld by the State, notwithstanding its indebtedness has reached the limit imposed by the Constitution.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J.* *John A. Campbell*, for relator, appellee. *Hornor & Benedict*, for respondents and appellants.

TALIAFERRO, J. This is an action brought by mandamus to compel the State Auditor and State Treasurer to register certain bonds issued by the State in aid of the company in the construction of their railroad through the State of Louisiana. This act of registration the defendants are required to perform by the seventh section of the act of incorporation, approved twenty-first of February, 1870. The relators show that by that act the State is bound to furnish in aid of the enterprise State bonds of the State of Louisiana to the amount of three millions of dollars, to be issued in installments of seven hundred and fifty thousand dollars each as the work of construction progressed and should be completed to certain specified points within the boundaries.

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of the State. They show that according to the conditions of the legislative act aforesaid, they have completed the construction of the road from a point on the Mississippi river opposite New Orleans or Carrollton to the Bayou Lafourche, and that the company, by the terms of the said act of incorporation, is entitled to receive State bonds for the first installment of seven hundred and fifty thousand dollars. They show that according to the provisions of the act of incorporation the Governor of the State has caused to be executed the number of State bonds required for the first installment of seven hundred and fifty thousand dollars, and have been presented to the Auditor and Treasurer for registration, an act the relators aver the said officers are required to perform by the seventh section of the act of incorporation. They allege that the Auditor and Treasurer refuse to perform the act of registration so required of them by law, and declare their purpose not to perform it.

A rule *nisi* was granted by the judge *a quo*, and the defendants show for cause: That by the third amendment of the Constitution of the State, promulgated on the fifteenth of December, 1870, it is provided that "prior to the first day of January, 1890, the debt of the State shall not be so increased as to exceed twenty-five millions of dollars;" that prior to the first day of June, 1871, the debt of the State exceeded the sum of twenty-five millions of dollars; that the claim set up by the relators formed no part of the debt of the State on the fifteenth day of December, 1870, and are not now a part of that debt, and they form no part of the current expenditures of the State necessary for its government or for the maintenance of its peace and order; that the Legislature was without power to pass the act under which the relators claim, the act being null and void, as having been passed in violation of the third amendment of the State Constitution. The respondents aver that the relators constitute a private corporation, its property private property; that it is managed and controlled for the individual benefit and advantage of its stockholders, and that the Legislature was without power to pass an act of donation or gratuity to a private person or corporation for his or its private advantage and benefit, and that the act aforesaid is therefore null and void; that as officers of the State of Louisiana, they have taken an oath to support the Constitution thereof, and can not be required to perform an act in violation of their oaths.

On hearing the case in the court below, the judge *a quo* ordered the mandamus made peremptory, and the respondents have appealed.

The legislative act approved February 21, 1870, extending the aid of the State to the New Orleans, Mobile and Chattanooga Railroad Company must be regarded in the light of a contract between the State and the company. That act, as we have seen, became a law of the

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State by the approval of the Governor on the twenty-first of February, 1870. The amendment to the State Constitution forbidding the increase of the State debt beyond the sum of twenty-five millions of dollars was promulgated and went into effect on the fifteenth of December, 1870. The effect of this amendment can not be retroactive. This must be determined upon elementary principles. Besides, upon no sound view of the purpose and intention of the people of the State in incorporating the third amendment into their State Constitution, can we conclude that the amendment contemplated any infringement of the obligations of the State lawfully entered into prior to its adoption. The act of the twenty-first of February, 1870, was in aid of an important public work, doubtless regarded by the Legislature as tending very greatly to increase the commerce and prosperity of the State, and as of paramount importance as a measure of public policy. Considering what we take to have been the controlling motives of the Legislature in extending the aid of the State to the construction of the road through its limits, we can not regard the aid so given as a mere donation or gratuity to a private person or a private corporation for its private advantage and without effect, as urged by the respondents. We think that in refusing to register the bonds as required by the act we have had under consideration, the respondents erred.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

No. 136.—B. G. & S. R. STEWART v. LOONEY & WELLS.

In this case the facts show that the tutor of the minors purchased a piece of property in the town of Shreveport in the name of the minors he represented; that he was much indebted at the time, and that the heirs he represented had no means of their own which were available at the time; that at his death the lands or lots were inventoried as his property, and sold at his succession sale. This action is brought by the heirs (since become of age) for the recovery of the lands or lots purchased by their tutor in their name. The defense of the purchasers at the succession sale of the tutor is that the title to the heirs by the tutor is a fraudulent simulation. Held that under this state of facts, and under the ruling in the case of *Frazer v. Prichard*, 6 An. 728, the purchasers at the succession sale had the right to allege and show the simulation.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Nutt & Leonard* for plaintiffs and appellants. *Looney & Wells*, in person, defendants and appellees.

HOWE, J. This is a petitory action to recover certain lots of ground in the city of Shreveport, which plaintiffs allege they acquired by purchase from B. F. Logan on the twenty-eighth December, 1863.

The defense is that the plaintiffs' title is a fraudulent simulation.

There was judgment for defendants, and plaintiffs have appealed.

It appears that, at the date of the act of sale from Logan in December, 1863, the plaintiffs were minors; that they were not living at

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Shreveport where their father, H. T. Stewart, resided; that they had no property (except perhaps a very trifling sum due them eventually from the succession of their mother, which amount, if existing at all in 1863, was too insignificant to be taken into account); that H. T. Stewart had unsatisfied judgments hanging over him; that he purchased the property in the name of his minor children, the plaintiffs, with the purpose admitted to one witness, at least, of putting it in their names to conceal it from these judgments; that he, and not the minors, furnished the money to make the cash payment of two thousand dollars, and gave two notes in his children's name for one thousand each, one of which has been paid by his administrator; that he remained in possession of the property up to the time of his death in 1864; that it was inventoried as an asset of his succession; and that it was sold at succession sale as his property and purchased by the defendants.

We think the defendants had the right to plead simulation as against the title and claims of the plaintiffs. This point was expressly decided in the case of *Frazer v. Pritchard*, 6 An. 728, and inferentially in the succession of *Weigel*, 18 An. 49.

The only question, then, is whether the defense of simulation here set up is established, and we concur with the judge *a quo*, who saw and heard the witnesses, that it is; that the interposition of plaintiffs as parties in the act of sale from Logan was fictitious; that the property was really that of H. T. Stewart at the time of his death; that it was inventoried as a part of his succession; and that it was sold under a decree of a competent court at public sale, and purchased by the defendants.

Judgment affirmed

Rehearing refused.

TALIAFERRO, J., *dissenting*. The simulated, in contradistinction to an actual though fraudulent sale, has been often defined in the decisions of this Court. It is that which is clothed with the empty forms of a sale, without possessing two of the elements essential in the contract of sale: the consent of the parties and the payment of a price. In the simulated sale, as repeatedly decided, there is no intention in the parties that a sale shall take place. What is presented as the consent is in reality no consent; the exhibition of the payment of a price, is not the payment of a price. There exists no *aggregatio mentium* in the parties to form a sale. The *aggregatio mentium* in the simulated sale is to delude and deceive others by holding up to their view a spectral illusion, a vain and empty vision of a pretended contract, unreal, unsubstantial, the mere shadow of a title, and nothing but a shadow.

It has been well settled by numerous decisions of this Court, running back through a series of more than thirty years, that simulated sales convey no title, and that a creditor may disregard the thin veil thus thrown around his debtor's property, and seize it directly without resorting previously to the courts to have the fictitious, nugatory title judicially set aside. And why? Simply because no sale has been made. A's property, in such a case, continues to be his property although it be enveloped with the *vana effigies*, the airy shape of a sale to B.

On the other hand, the law bestows a degree of regard and respect upon actual contracts, even though they be fraudulent, and forbids that they be disregarded entirely as in cases of mere simulation. The actual contract, although fraudulent, can not be so summarily dealt with. In contracts of that character one of the parties may be in good faith. His rights must be protected. In all cases of an actual contract, where it is tainted with fraud intended to injure third parties, the complaining party must invoke the aid of the law, lay bare the fraudulent act by proof, show how it injuriously affects his rights, and obtain a judgment annulling the sale, before he can render the property, fraudulently sold, subject to his just claims. Cases have been frequent where parties, in hot haste to reach the property of their debtors, and seizing it in third hands, alleging simulation, have been enjoined, and upon a hearing in the courts have had their proceedings set aside and themselves thrown back upon the revocatory action. The distinction between mere simulated sales and actual though fraudulent sales, has been broadly drawn and distinctly marked. The cases in which this has been done are so numerous that it is unnecessary to refer to them in detail. Still, a practice reprehensible in my opinion, has been to no small extent inaugurated, which confounds this obvious distinction, and which, as caprice may direct, attacks actual contracts under the pretense that they are "simulated and fraudulent." This practice is deemed a proper and convenient one to resort to when the revocatory action is prescribed. By simply calling the act "simulated and fraudulent," it is dealt with as a pure simulation. A pretended or sham contract is necessarily both simulated and fraudulent; but an actual contract, whether fraudulent or not, can never be simulated. It is a solecism to apply the term "simulated" to a contract which the parties made real, and intended to make real.

The practice I have adverted to has, I am disposed to think, been resorted to in the case now before the Court. The sale from Logan to the minor children of Stewart, represented by their father, is attacked as "simulated and fraudulent." The facts presented by the record satisfy me that there was, in this case, an actual contract. It

is clear to my mind that Stewart intended to buy in his representative capacity, and that Logan intended to sell. A large portion of the price was paid. A delivery was made, and Stewart went into possession as the natural guardian of his children. No law prohibits a father from buying property for his children. Certain formalities are required to be observed in the purchase of property for minors by their tutors, but the neglect of these do not necessarily annul the acts so made.

The record satisfies me that there were really few debts owing by Stewart at the time of his death. The pretended judgments displayed by the administrator appear to have been either paid or prescribed before the administration. No creditor seems to have presented them. The administrator is himself at a loss to know who represented the debts placed on his final account. The two largest items of indebtedness, \$1080 to Brooks & Price and \$471 to Swink, were stated by the administrator to have been contracted on a Confederate money basis. These were debts for which he should not be allowed a credit, for he was not bound by law to pay them. The other debts are chiefly if not entirely debts having their origin in the administration of the estate. The judgment creditors alone, if there were any, might have seized at their peril the property in the name of the plaintiffs, and alleged in defense that the sale was simulated. But the judgment creditors in this case were mythical. They were unknown, and consequently were not pressing claims. Has the administrator greater rights than the creditors he represents? Where none of them could resort to a seizure of property on the ground of simulation, shall the administrator step forward, place upon his inventory property the title to which he finds not in the name of the decedent, but of other parties, and proceed to advertise and sell it? Suppose that Stewart intended a fraud upon his creditors, and the administrator acting in their interest felt it his duty to have the sale set aside and the property declared to belong to the estate. He could only have brought a revocatory action for that purpose, and he could only have done that where there were creditors who have been injured by the sale. 6 An. 494. No showing of the sort has been made in the case now before this court.

The administrator in this case has moved altogether *ex proprio motu*. His administration, so far as it purports to have been regularly conducted, is itself a simulation. The administrator, it does not appear, was a creditor, and yet he appears to have been far more vigilant than those whom he represents were creditors. The course he has pursued strikes me as anomalous, and but little deserving the sanction of the tribunals of justice.

The defendants' counsel rely chiefly on the case of *Frazier v. Prichard et al.*, 6 An. 728. The court there said the act of Frazier was a simulation, but simulation of a particular kind. The facts in that case

 B. G. & S. R. Stewart v. Looney & Wells.

were that Frazier bought for his minor children a tract of land from Morris, taking the title in their names. A valuable consideration was actually given; a sound price was really paid. The tract of land was delivered, and Frazer took possession of it under the sale. I regard this case as isolated. It stands alone and unsanctioned by any previous or subsequent case. It is confronted by a host of decisions which are uniform in declaring a doctrine utterly at variance with it, and which mark it as antagonistic to the well settled jurisprudence of the State. In that jurisprudence it has been long and definitely determined that by a simulated sale no title passes. The logical sequence of that doctrine, when applied to the facts of the case at bar, is that the property taken as Stewart's is not his, but Logan's, for, being a simulation, no title passed from Logan. If the deed from Logan is a sheer simulation, then there is no deed. No title passed, if the deed is invalid. But we are told that title passed by it to Stewart himself. If title passed by the deed, it is valid, and can not be attacked as a simulation. But if valid it must speak for itself. We must learn from its own recitals to whom the title passed. This court is powerless to interpret a valid written contract to mean anything different from that which the plain purport of the language used indicates. The alternative is stern and inevitable. The act purporting to be a sale from Logan to the plaintiffs is a title to the plaintiffs or it is a title to nobody. If it be a title to the plaintiffs, the defendants have no right to attack it as a simulation. I think the plaintiffs should have judgment in their favor, reserving to the defendants their right to proceed according to law by a revocatory action to set aside the plaintiffs' title.

I concur with Mr. Justice Taliaferro in the dissenting opinion expressed in this case.

W. G. WYLY.

No. 206.—G. W. C. TREZEVANT, Administrator, v. JUNIUS COURTNEY.

In an action by the creditors to annul a sale made by the sheriff of the debtor's property, on the ground that the purchaser is an interposed person who took the title fraudulently for the purpose of defeating them, the declarations of the debtor before the sale, made out of the presence of the purchaser, which are not shown to be brought home to him before the sale, are not sufficient to establish that he purchased the property for the debtor. Fraud may be proved by parol evidence, but unless the fraudulent declarations of one of the parties is shown to have reached the other party, and to have been the motive for his action, the transaction will not be set aside on the ground of fraud.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. H. W. Drake*, for plaintiff and appellee. *Richardson & McEnergy*, for defendant and appellant.

HOWELL, J. This is an action by the administrator of the succession of Eben Miller, deceased, to have declared simulative, fraudulent and of no effect a sheriff's sale made on sixth July, 1867, of a certain tract

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of land to defendant, in the suit of W. Oliver v. Joel McDonald, on the grounds that the defendant being a person interposed, the real purchaser was the said Miller, who paid the price and who was insolvent at the time of sale and of his death, and used the name of defendant to conceal his property from his creditors. The defendant denies the simulation and fraud, and avers that he bought the property with his own funds for his own benefit. Judgment was rendered in favor of plaintiff, and defendant appealed.

The evidence in the record does not satisfy us of the correctness of this judgment. The principal proof, tending to show that defendant was interposed to cover up the property of the deceased, is in the testimony of two witnesses, J. T. Grubbs and the deputy sheriff who made the sale, and consists of statements which, they say, were made to them by the deceased, out of the presence of the defendant before the sale, to the effect that he wished to purchase the land, but would put the title in the name of the defendant, who is his son-in-law, and resides in another parish, to prevent his wife and other creditors from reaching it. But a knowledge of these statements or such instruction, on the part of the deceased, is not brought home to the defendant, and hence they are not evidence against him. The court did not err in admitting this evidence, as fraud may be proven by parol, and the parties can not be controlled in the order of introducing their evidence; but unless the statements or doings of one of the parties to the alleged fraud are connected with or brought to the knowledge of the other, they can not establish fraud in the latter. 18 An. 848, and authorities there cited. It is true the deputy who made the sale states the fact that some three or four weeks before the sale the deceased deposited in his hands money for the purchase of the land, stating it to be his own money, but he does not say that said money was so used; on the contrary, his official return shows that J. Courtney, the defendant, was the purchaser as the last and highest bidder through his agent for a particular price, a portion of which was "paid cash in hand," and the balance the "said Courtney retained in his hands to satisfy the *pro rata* share of the two notes of equal rank with the one herein mentioned, as shown by the mortgage certificate."

The testimony of the defendant and the correspondence between him and the deceased, sustain the position that the defendant was the real purchaser, with the understanding that the deceased was to occupy the property as a home, put it in repair, improve and cultivate it at his own expense during his lifetime, the rent or use of it to be compensated by the improvements put on it by him.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant quieting him in the possession of and title to the land described in the petition, with costs in both courts.

No. 104.—JOHN H. MITCHELL, Dative Testamentary Executor, v.
ABRAHAM LEVI.

A purchaser of a tract of land at probate sale made under an order of a court of competent jurisdiction, directing a sale of *all* the property of the succession, is not affected by the failure of the executor to have such land placed on the inventory or to have it accurately described on the inventory.

If it appear that gross negligence and want of due precaution has characterized the actions of the executor in the manner of conducting the administration of the estate he represents to an extent which amounts to a fraud on the estate, yet the purchaser at probate sale, in good faith and unconnected with the fraud, is not affected thereby, if it be shown that the order under which he purchased emanated from a court of competent jurisdiction and the proceedings thereunder were regular upon their face.

The fact that one of two law partners is the executor of an estate does not disqualify the other member of the firm from acting as the agent of a creditor of the estate.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. W. J. Q. Baker*, for plaintiff and appellee. *Morrison & Farmer*, for defendant and appellant.

This case was tried by a jury in the court below.

TALIAFERRO, J. This action is brought by the plaintiff as dative testamentary executor of John Liles, deceased, to annul an adjudication made to the defendant of a tract of land sold at a probate sale of Liles' estate on the twenty-third of May, 1863, and which was invoked by Morrison, the former executor of Liles. The petition charges, that through the fraudulent contrivance of Morrison, participated in by the defendant, a tract of land belonging to the estate, containing in reality five hundred and ninety-three acres and a half, was illegally and fraudulently sold as containing only three hundred and fifty-nine and a half acres, and adjudicated to the defendant, represented at the sale by an agent, who is also charged with having knowledge of the fraudulent concealment of the quantity of land sold within the specified boundaries and as having been appointed to this agency by Morrison himself or at his instance. The suit thus brought is properly the sequel of one entitled "*John C. Rogers et al. v. C. H. Morrison, Executor, et al.*" instituted in the parish court of the parish of Ouachita and brought by appeal before this court at the Monroe term of 1869. See 21 An. 455. The decree then rendered removed Morrison from his office as executor, but dismissed the demand for the annulment of the sale for want of jurisdiction of the parish court without prejudice to the plaintiff's rights. The two suits are, therefore, blended, the present plaintiff adopting as his own all the allegations of the plaintiff in the former action. He avers that there was no legal and proper inventory made of the plantation on which the decedent resided; that there was left off the inventory a tract of land purchased by the decedent from John F. Parker, containing two hundred and thirty-four acres cleared and in cultivation; and that Morrison, the executor who caused the

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inventory to be made, knew the fact that this parcel of land belonged to Liles' estate, and yet failed, refused and neglected to have it placed upon the inventory and appraised; that the advertisements do not correspond with the inventory nor with the facts, and that the attempt to fix metes and bounds in the advertisements not fixed by the inventory was illegal and a badge of fraud, and rendered the whole sale null and void.

The case was tried before a jury. They found a verdict in favor of the plaintiff and judgment was rendered by the court below annulling the sale to Levi and decreeing the land in controversy to be the property of the estate of Liles. The defendant prosecutes this appeal.

We do not think it important to discuss the several bills of exceptions that were taken during the trial of the cause, and, therefore, omit a special notice of their contents.

Four several tracts of land lying on the east side of the Ouachita, belonging to Liles' succession, are specified on the inventory. Three of these lots or parcels are designated as being lots Nos. 6, 3 and the east half of lot No. 4, "in the partition of the estate of Frantom." The fourth is described as acquired by the decedent from W. E. D. Scarborough on the twenty-seventh of July, 1850, and as lying on the east bank of the Ouachita river, five miles below Monroe, and containing two hundred and thirty-seven acres, more or less. The aggregate of the whole is put down as five hundred and seventy acres and forty-three-hundredths, appraised at thirty-five dollars per acre. The quantity of each of the three lots of the Frantom land is given. There are no special and exact metes and bounds given to each lot or tract separately or to all the tracts collectively. These lands were sold in two parcels, one of which is stated to contain two hundred and ten acres and a fraction, and the other three hundred and fifty-nine and a half acres. The first of these was purchased by Mrs. Liles, the second by Levi. Both in the advertisement of sale and in the sheriff's process verbal of sale these lots are given specific boundaries. The lot purchased by the widow is called the Frantom tract, lying on the Ouachita river, bounded above by the lands of the heirs of Reuben Frantom and below by the lands of R. W. Richardson, containing two hundred and ten and three-hundredths acres, more or less. The lot purchased by Levi is called "the plantation on which deceased resided at his death, lying on the Ouachita river, about seven miles below Monroe, Louisiana, bounded above by the lands of R. W. Richardson and below by the lands of the heirs of Reuben Frantom, containing three hundred and fifty-nine and a half acres, more or less." It is fully established by the evidence that the intervening "Parker" tract, containing two hundred and thirty-seven acres, lies within the metes and bounds given to the portion of the land adjudicated to Levi.

The plaintiff lays much stress upon the fact that by the advertisement and proces verbal of sale the same metes and bounds are not given that are found in the inventory, and contends that the nullity of the sale results from such discrepancy. It is usual in advertising lands for sale under orders of court to refer to the public inventories of the property for the locations, boundaries and quantities of the tracts or parcels to be sold; but we are not referred to any law which imperatively requires, under pain of nullity of the sale, that the description in the advertisement or sale shall follow exactly that which is given in the inventory. If such were the rule many sales would be found defective. It often happens that locations and boundaries are imperfectly expressed in inventories. There can be no good reason in such cases why the identical lots or tracts of land may not be more accurately described and designated in an advertisement or sale by the use of terms which indicate more clearly their locality, extent and boundaries. In the case before us, if the quantity actually contained within the specified boundaries of the tract purchased by Levi were correctly given, both in the inventory and advertisement, would nullity result from the boundaries being expressed as they are in the advertisement and sale instead of the manner used in the inventory, the lands meant being identical? If so, the sale of the portion of the lands of the estate to Mrs. Liles would, for that reason, be a nullity; but this is not claimed by the plaintiff. The petition of the executor, Morrison, for a sale of *all* the property of the estate to pay its debts was followed by an order responsive to the prayer of the petition. How far the purchaser of a tract of land at a probate sale of succession property, made under an order of a court of competent jurisdiction, directing a sale of *all* the property of the succession, could be affected by the failure of the representative of the succession to have the tract placed upon the inventory and appraised, we will proceed to consider. The testimony in this case forbids the conclusion that the omission to place upon the inventory the tract of land purchased from Parker could have arisen in any other way than through the grossest and most inexcusable neglect of duty on the part of the executor, acting at and prior to the sale. The reasons for entertaining this view of the matter are given in the case in 21 An. referred to, and it is needless here to reproduce them. The matters for inquiry now are more especially: Did the defendant, Levi, enter into a fraudulent scheme with any person to deprive the succession of Liles of a large and valuable tract of land under the fictitious purchase? Did he, with the intent to enrich himself by the loss of the estate, become a party to an act of spoliation, if the concealment complained of in regard to the quantity of land sold be properly so called? Had his agent such knowledge, or had his agent any complicity in a scheme to defraud the succession?

It is shown that Levi is a judgment creditor of Liles with first mortgage against the property of the estate for a large debt; that Levi is a commission merchant residing in New Orleans; that Liles dealt with him in that capacity, obtaining from him necessary supplies to a large amount to carry on his business of planting; that Morrison & Farmer, as the attorneys of Levi, had charge of and attended almost exclusively to his business in the parish of Ouachita; that the matters relating to his purchase of the land were managed and directed entirely by his attorneys; that the object in view in making the purchase was to secure the debt of Liles; that Levi had never been on the Ouachita river before the trial of this suit, in which he was a witness, and that he had never seen the land purchased for him by his agent; that he is not in the habit of purchasing or speculating in lands. The plaintiff aims to show that, in fact, by a transfer of certain notes of one Hogan to Levi, and upon which judgment was obtained in favor of Levi, the debt of Liles to Levi was extinguished; but in this we think he has failed. But whether a creditor or not he was bound to pay the price bid for the land, and this, it appears, he was at any time able and ready to do had there been a proper party ready and willing to receive. In fact he made a legal tender of payment, which was refused. In his testimony he disclaims in the clearest and most pointed terms any knowledge of or participation in any measure intended by undue means to acquire the land in question. We are constrained, from our review of the evidence, to say that we find nothing in it which we think warrants the belief that Levi had knowledge of or participated in any fraudulent act in the proceeding. All that is presented to show a different aspect amounts to little more than conjecture or inference. The principle is elementary that fraud is not presumed, but must be proved. There is nothing we find in the testimony which in the slightest degree rebuts the strong exculpatory evidence in behalf of the defendant, and if a fraud were intended on the part of Morrison we should be left to infer that his act was prompted by ulterior views and motives of which the defendant Levi is ignorant.

We next turn to the position of Farmer, who acted as the agent of the defendant, Levi, in purchasing the land for him. It is objected by the plaintiff that Farmer was incompetent to act in the capacity he did and that that renders the purchase by him null. Farmer, throughout the whole proceedings, was the law partner of Morrison, and as such it is strenuously held that Morrison being the executor of Liles' estate and the proceedings taken in regard to the affairs of the estate being conducted by the firm of Morrison & Farmer, it was illegal and reprehensible in him to act also in the interests of Levi, which were adverse to those of the succession. The evidence discloses that in

regard to the business and interests of the succession they were exclusively attended to by Morrison, the executor, although the firm's name was signed by him to the documents necessary to be filed in court. We see no such incompatibility in this case as rendered Farmer individually incompetent to act as the agent of Levi in the single act of appearing at the probate sale and bidding for him. He was not the agent of the succession to sell. His relation to the succession prior to the sale was that of attorney at law. There did not exist in his case the inconsistent relation of buyer and seller in the same person. Perhaps it were best in all things to shun even the appearance of evil, but we imagine it often happens that an agent's acts have an apparent incongruity when no legal incompetency exists. ,

The plaintiff, in our understanding of the evidence, has entirely failed to establish that the agent of Levi had any knowledge of a fraudulent design in the sale of the property of Liles' estate and consequently of any complicity in it.

The defendant, then, standing in the attitude of a *bona fide* purchaser, it remains only to inquire whether he is affected by any irregularities or illegalities that may exist in the proceedings in regard to Liles' estate prior to the order of sale. And we would here remark that it has so frequently been held by this court that in sales of the kind in question, the purchaser is not bound to look beyond the order of a competent court directing the sale, it seems hardly necessary to advert to the numerous decisions sustaining this doctrine. In the case of the succession of John Gurney, 14 An. 622, in an action to annul a sale on the ground of grave defects in the inventory, no showing made of the necessity of a sale, and that no notice had been given to absent heirs, the court decided that there were "irregularities which do not render the decree of the court and the sale under it null and void," and go on to say: "The court had jurisdiction, and its decree protects the purchaser, although he was the administrator and one of the heirs at law, in the absence of any charge or proof of fraud against him." 13 La. 432; 16 La. 440; 3 R. 122; 9 An. 107; 18 An. 485 and 553; 21 An. 505.

We therefore think that under the authority of these and many other decisions, the exception was well taken by the defendant to the refusal of the judge *a quo* to give this well settled doctrine in charge to the jury.

For the reasons assigned, it is ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is ordered that the sequestration taken out by the plaintiff be set aside, and that the defendant be quieted in his title and possession of the tract of land purchased by him at the probate sale of the succession of John Liles, deceased, on the twenty-third of May, A. D. 1868, the plaintiff paying all costs of these proceedings.

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LUDELING, C. J., *dissenting*. This is an action to annul a judicial sale on the ground of fraud and other illegalities. A branch of this case was before us in July, 1869, and we then said: "We think it established by the record that the home place really contained about five hundred and ninety acres, and that its sale for \$5250, if maintained, would result in a great loss to the estate." * * "It appears that he (the executor) has been recorder of this parish; that he was a neighbor and intimate friend of the deceased; that he was a witness to the act of sale from Parker to Liles of the omitted tract; that this act was recorded and indexed at the time the inventory was made; that as attorney for Liles he had occasion to know that during the last year of his life the decedent rented three hundred acres of cleared land of the home place to Hardy, and cultivated himself about one hundred and forty acres; that, at the first offering, he was admonished by Judge Richardson that the place contained upwards of five hundred acres, and that he was under the impression himself, as appears by his own evidence, that the plantation contained more land than the advertisement described, and yet, under such circumstances as these, without making a search, he causes the place to be sold *per aversionem*, in such a way that, if the sale be not hereafter annulled, the defendant Levi will secure five hundred and ninety acres instead of three hundred and fifty-nine and a half acres, which were inventoried."

At the instance of the defendant the case was tried by a jury, who found a verdict for the plaintiff, and the judge *a quo*, who heard the witnesses, rendered judgment accordingly.

It appears that Morrison & Farmer were attorneys for the estate of Liles. In the case of *Rogers v. Morrison* we said that Morrison, as Liles' attorney, had occasion to know that more lands were embraced within the boundaries than were advertised. Farmer was the agent of Levi, and his knowledge was that of his principal. Only three hundred and fifty-nine and a half acres were inventoried, appraised and advertised, and only those who possessed information, not furnished by the advertisement, could know that five hundred and ninety acres of land were to be sold.

It was a fraud in both the buyer and the seller to attempt to sacrifice the property of the estate in such a manner.

The purchaser Levi has never complied with his bid. It was a credit sale—the bidder has never executed his notes with security, as required by law and the advertisement, or paid one cent for the property up to this day. No such notes are produced or shown to have been executed.

Why this extraordinary indulgence to this bidder, when the executor had in such haste obtained an order, within less than six months after the death of the testator, to sell all the property of the estate to pay debts?

It does not appear that Farmer had a written power of attorney to buy for Levi, or express authority to sign notes in his name.

Levi testified that he had never been on the place before the sale, and did not know that it contained more land than was mentioned in the advertisement. If this be true, it is dishonest for him to claim five hundred and ninety acres when only three hundred and fifty-nine and a half acres were bid for.

Can an executor sell property which has never been inventoried and appraised?

The three hundred and fifty-nine and a half acres which were inventoried and appraised were appraised at \$35 per acre. The five hundred and ninety acres claimed to have been sold brought only \$5,250, or less than one-third of the appraisement *per acre*.

The order directed that the property of the estate be sold "according to articles 990 and 991 of the Code of Practice." These articles direct that the property should be sold at *its appraisement* for cash, and if the appraisement be not bid, then that it be sold on a credit of twelve months. *Two hundred and thirty acres of the land were never appraised*, consequently the terms of articles 990 and 991 were not complied with, nor was the mandate of the court obeyed. The executor was not authorized to make *per aversionem* by the order of sale, or the law, and he could not legally have done so.

But, even if fraud had not been proved, the defendant should not be permitted to get a title to five hundred and ninety acres of land when he and his agent believed they were buying only three hundred and fifty-nine and a half acres.

I think the Parker tract, which was not inventoried or appraised, could not have been legally sold. C. P., articles 990, 991, 992; 2 An. 996; 5 An. 1. The order to sell property of an estate can not be extended so as to authorize the sale of property not inventoried or appraised, and the sale is void on account of the absence of a judgment or order of a court to authorize it.

But I deem it unnecessary further to refer to the concatenation of circumstances which indicate fraud in this sale.

The verdict of the jury should not be disturbed on a question of fraud unless the evidence shows that their verdict is *manifestly wrong*.

This, I take it for granted, can hardly be said to be the case when two of the judges of this court and the district judge, before whom the case was tried, concur in the opinion that the verdict is correct. I apprehend that it will be the first time in the history of jurisprudence that such a thing was done.

I am constrained, therefore, to dissent from the opinion of the court.

HOWE, J. The defendant asked for a jury, and they found a verdict against him. The questions were peculiarly within their province. and I am not prepared to say that their finding was erroneous.

Walker & Vaught v. Kimbrough, Administrator—Sadler, Tutor et al., Intervenor.

**No. 187.—WALKER & VAUGHT v. G. W. KIMBROUGH, Administrator—
R. B. SADLER, Tutor et al., Intervenor.**

The community is dissolved by the death of one of the spouses, and the title to one-half thereof vests absolutely in the heirs, and the other half in the survivor. The survivor is, therefore, without legal authority to encumber or mortgage the one-half interest of the heirs in the community.

The parish court has jurisdiction of an action of partition of the community between the heirs and the survivor without reference to the amount involved.

In this case notes were given with mortgage to secure advances to be made and supplies furnished and to be furnished. At the close of the transactions, plaintiffs bring suit on the account current, which includes in its items the amounts of the notes, and they ask a recognition and enforcement of the mortgage given to secure the notes.

Held—That the notes having been given for a particular purpose, namely, to enable the merchants to negotiate them, and having been taken up by the agents of the plaintiffs, confusion took place, and they, the notes, became extinguished, and the mortgage given to secure them was also extinguished; and that as the mortgage was only given to secure the notes, it had no effect as a security for the account.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiffs and appellees. *C. T. Dunn and D. C. Morgan*, for defendants and appellants.

LUDELING, C. J. The plaintiffs, who are commission merchants, sue for a balance due on an account current between themselves and the commercial and planting partnership of Montgomery, Peterkin & Co., composed of Robert D. Montgomery, George A. Peterkin, W. R. Ward and M. D. L. Allen. The petitioners allege that Ward is dead, that M. D. L. Allen has left the State, and that Montgomery and Peterkin are insolvent; and they allege further that the balance due them, \$8205 01, is secured by a mortgage executed by W. R. Ward on his individual property.

The administrator filed an exception, alleging that the obligation sued upon is a joint obligation and all the co-obligors are not sued. We are satisfied that the firm of Montgomery, Peterkin & Co. was a commercial partnership, and though they were engaged in cultivating plantations, their obligations are solidary.

The defendant filed an answer containing a general denial and allegations that the account contained illegal, usurious and improper charges to the extent of at least one thousand dollars, and that the interest has been compounded, etc.

Ida Ward, and her husband Sadler, who joined his wife, to authorize her to prosecute this suit, and as tutor to the minor children of W. R. Ward and his wife, C. N. Smith, both deceased, filed a petition of intervention, alleging that their mother died on the eighteenth of March, 1867, and that at the period of her death the property in the possession of the husband was community, and one-half of it belonged to them, subject to the debts; that a portion of the lands thus owned had been regularly partitioned, and the partition had been duly homologated by the judgment of the court; that their father's succes-

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sion is indebted to them in a large amount, for which they have a mortgage and privilege. They further allege that the plaintiffs are endeavoring to establish and enforce a mortgage to secure the payment of their alleged indebtedness on property, which at the time the alleged mortgage bears date, to wit: the twenty-fourth of April, 1867, belonged to them as aforesaid, as their mother had died anterior to that time. They further allege that the account is incorrect in many particulars, which they specify. They allege that the notes (which are said to be secured by a mortgage) were never sold or discounted by Walker & Vaught; that the discount which is deducted from said notes and omitted to be credited, of about \$1000, together with the interest thereon, was only a device and scheme to wrong Montgomery, Peterkin & Co.

The plaintiffs excepted to the intervention on the ground that the petition disclosed no cause of action; that the partition under which the intervenors claim a portion of the land mortgaged was absolutely null, for the reason that the court which rendered the judgment was without jurisdiction *ratione materia*, as the property partitioned exceeded in value \$500, and that the property partitioned was community and could not be partitioned until the community had been settled, and that for the same reason they can not claim half the proceeds of property belonging to the community, or any specific part of said property.

This exception was overruled, and answers to the intervention were filed. But subsequently the judge *a quo* refused to permit the intervenors to prove any allegation made by them, and dismissed their intervention on the grounds stated in the plaintiffs' peremptory exception. To this ruling the intervenors retained a bill of exceptions.

We think the learned judge erred. The petition alleges that the mother of the intervenors died in March, 1867, before the mortgage was executed. At the moment of her death the rights of the heirs, although residuary, were vested in the half of the property composing the community, and the surviving partner of the community could not legally mortgage the property so as to affect the rights or interests of the minors. The mortgage itself recites that W. R. Ward is a widower.

The parish court had jurisdiction to partition property of the community. Art. 87, Constitution.

We are not prepared to decide that the partition of the community property was premature. There is nothing in this record to justify such a conclusion. For aught that appears, the debts of the community had been paid before partition, and we will not presume that the parish court acted improperly but correctly.

In fact, the theory on which alone the mortgage claimed could be

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maintained, that the mortgage was intended as a continuing guarantee to secure any balance due on the account, would establish the fact that the debt due to the plaintiffs is not a community debt.

The mortgageor, Ward, died in 1869, and the account runs to about the period of his death, and between the creation of the mortgage and the date of the death of Ward large credits and debts appear on the account, showing that the balance, whatever it may be, is due by Ward and not by the community, which had ceased to exist before the execution of the mortgage. We think, therefore, that the intervenors should have been permitted to introduce proof to establish their allegations. But the conclusion to which we have arrived in the controversy between the plaintiffs and defendants renders it unnecessary to remand this cause.

As between the plaintiffs and defendants, the principal question is whether or not the plaintiffs have a mortgage to secure the balance due them on account, or the balance due on the two notes. We regard this suit as based on the account current. The two notes which were described in the act of mortgage are items in the account, and copies of them are annexed with the account. The notes are alleged to be destroyed, but no affidavit of their loss or destruction is made, nor is there any proof that their loss or destruction had been advertised, which would have been done, as it is necessary, if suit had been instituted on them.

The account current shows that the two notes were made in favor of the plaintiffs, one for \$1469 27 and the other for \$6718 52, and that the plaintiffs charged defendants with the amount of these two notes and credited them with the net proceeds thereof, \$10,212, and that the plaintiffs continued to charge interest on the various items of the account preceding the execution of the notes up to the close of the account. We think it is clear that these notes were not intended to novate the account or any part of it, but that it was a mode adopted whereby the agents of the defendants were to raise money for their own use, or to enable them to exact the charges for discounting and advancing. If the notes had been given in settlement of the account, the whole amount of the notes would have been credited on the account, and interest on the account would have been arrested.

The notes having performed the functions for which they were made, and having been taken up by the agents of the makers, they were extinguished by confusion, and they are now mere vouchers in the hands of the factors to prove items of their account. The mortgage was given to secure the payment of the notes, no doubt the better to enable the factors to discount them, and when the notes were extinguished the mortgage, as an accessory, was also extinguished. C. C. arts. 2217, 3287, 3411; Hill v. Hale, 4 R. 416.

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The attempt to explain or contradict the written act of mortgage by the testimony of Walker, one of the plaintiffs, was properly not allowed. The notarial act declares that the mortgage was given "to secure the punctual payment of the aforesaid two promissory notes at maturity, as well as of all interest that may accrue thereon," and there is nothing which in the remotest degree indicates that the parties intended that the mortgage should be a continuing guarantee to secure the payment of the account current or any balance of account, and we are not at liberty to make new contracts for the parties.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed; and it is further decreed that there be judgment in favor of the plaintiffs for the sum of \$7227 19, with five per centum per annum interest from judicial demand, with costs of the district court, to be paid in due course of administration. It is further ordered that the costs of appeal be paid by the plaintiffs and appellees.

HOWELL, J., *dissenting*. On second February, 1867, the firm of Montgomery, Peterkin & Co. owed plaintiffs \$11,187 79 on an account, for which they made two notes, with interest after maturities, to the order of plaintiffs and payable in December following. The account between the parties was continued without change. On the thirtieth March, 1867, the proceeds of one of these notes was placed to the credit of the makers, a commercial and planting firm. On the twenty-fourth of the next month (April) it appearing that the debt exceeded the amount of the two notes, the excess was paid by W. R. Ward, a member of the firm of Montgomery, Peterkin & Co., who, at the same time, executed a mortgage on his property to secure the payment of the notes, for the amount of which he confessed judgment in the act and bound himself to ship to plaintiffs the cotton to be raised on their plantations by his firm. No change was made in the account. On the fifth of June following, the proceeds of the other note was placed to the credit of Montgomery, Peterkin & Co., the makers. On the twenty-eighth December, 1867, the date of the maturity of the last of the notes, the amount of both was charged in the account, which being closed, shows a balance something less than the two notes. The question is: Were these notes paid by this course of dealing? I think not. When they were discounted the proceeds were placed to the credit of the makers, but they were still outstanding as a subsisting debt against both the makers and the indorsers and secured by the mortgage executed by Ward, whose succession, as I think, is sued in this action to recover the amount due on them with mortgage. When taken up by the indorsers (the plaintiffs), was it a payment of the

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notes or did they return to plaintiffs with the mortgage accessory? I think the latter. They were evidently paid with the funds of the indorsers, who were bound with and for the makers, and the payment was with legal subrogation, even if not specially protected by the terms of the mortgage. But Ward, the mortgageor, executed the mortgage expressly to secure their payment at maturity. The makers, in whose behalf he gave this security, did not pay them. No funds were provided either by Ward or the makers for their payment, and hence the obligations of the act of mortgage are still in force. It certainly was not contemplated that the payment by plaintiffs as indorsers would extinguish the mortgage, for it was given in their favor, or of any holder, to secure their payment by the makers or the mortgageor. Had the latter or either of them furnished the funds to make the payment, there would have been no occasion for this suit or any other on this debt.

I think the mortgage is in force upon the property which Ward was capable of mortgaging and deem it unnecessary to determine the nature of the debtor firm.

Howe, J., *dissenting*. All that was necessary to the decision of the case of Ward v. Douglas, 22 An. 463, was the settlement of the question whether or not the plaintiffs herein were entitled to executory process. The question of the existence of the notes and their accessory mortgage is still open.

I think the notes still exist to the amount of advances made and remaining unpaid, and that the mortgage may be enforced.

No. 243.—R. W. & R. RICHARDSON v. SOLOMON W. DOWNS.

The father has the legal right to engage counsel to defend his minor son who owns property in his own right, and if the minor, after emancipation, ratifies the employment of counsel in his behalf while he was a minor, he is legally bound to pay the fees.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Ray, J. R. W. & R. Richardson, in propria personæ, plaintiffs and appellees. Stubbs & Cobb, for defendant and appellant.

LUDELING, C. J. The plaintiffs sue the defendant for \$1500 for professional services rendered in five suits against the defendant.

The defense is that at the time the said suits were instituted, defendant was a minor under the control of his father, that the debts for which he was then sued were not due by him; and that the sum charged is excessive.

The evidence discloses the following facts: That the minor had a large property in his own right, inherited from S. W. Downs, deceased;

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that his father and mother were both alive; that the father was insolvent; that the minor was sued in the various suits stated in plaintiffs' petition; that plaintiffs defended the suits successfully, and that the amounts claimed in said suits, in the aggregate, exceeded \$20,000. It further appears that after several efforts to bring the minor into court, he was emancipated; that he himself, after his emancipation, paid the plaintiffs their fee for having him emancipated; he was then personally cited in the causes aforesaid, and was defended by the plaintiffs.

We think the father had authority to bind his minor son by engaging counsel to defend the rights of property of the minor, under the circumstances of this case, and we think that the facts in this case show that the minor ratified the acts of his father in engaging the services of the plaintiffs. The evidence shows that the fees for the services rendered are reasonable, and the judge before whom the services were rendered believed them fair, and so we think.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

Rehearing refused.

No. 227.—C. T. DUNN v. JOHN CALDERWOOD.

During the late war C, a British subject, entered into a contract with A, a resident of the State, whereby the former was to receive and take in his possession a large quantity of cotton and ship the same to Europe and divide the profits arising therefrom equally with A. A further condition of the agreement was, that if the cotton was destroyed or taken possession of by either of the contending forces, that then C was to recover and pay over to A his proportion of the amount so recovered on account of such forcible taking or destruction.

The cotton was not taken or destroyed by either of the contending forces, but was destroyed by the accidental burning of the gin house in which it was stored. C gave his notes at the time of the execution of the contract in favor of A for an amount equal to his estimated interest in the cotton in case it was sold by C in Europe. A now brings suit on the note.

Held—That the contract of the parties in reference to the cotton and for which the note appears to have been given was not a sale of the cotton, and therefore C, who had given the note, was not in possession at the time it was destroyed by fire. That, not being in possession under a title he could not be held liable for the price or value thereof.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. D. C. Morgan and R. W. Richardson*, for plaintiff and appellee. *Stubbs & Cobb*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues on a promissory note signed by the defendant on the twenty-second of August, 1863, payable one day after date to C. T. Dunn for \$7580.

The defendant excepts to the action, alleging that the plaintiff ought not to recover upon his demand on the ground that his suit is premature, as any liability defendant may incur under the agreement between himself and the plaintiff depends upon the delivery by plain-

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tiff to the defendant of a certain amount of cotton, to be by him shipped to Europe and sold on joint account, which cotton the defendant avers the plaintiff has never delivered

The defendant answered, adopting the allegations of his exception, and denied generally the allegations in plaintiff's petition.

In the court below there was judgment in favor of the defendant, rejecting the plaintiff's demand. The plaintiff has appealed.

It appears there were two contracts, or one contract evidenced by two instruments, written and printed. These documents fill several pages of the record, and seem clearly to show the purpose and intention of the parties; and it is in reference to that purpose that the entire act or acts must, in the sense and meaning resulting from a consideration of the whole, be examined. The circumstances under which the parties contracted must be looked to as giving complexion to and explaining the contract they entered into. A state of war existed in the country. Federal troops were advancing into the interior from the Mississippi, and it was apprehended they would pass through the parish of the plaintiff's residence, where he had a large amount of cotton, some of which was baled, and a considerable portion of it unginned or in the seed. Cotton was thought to be in danger of destruction from both friend and foe. The Confederate authorities had adopted the policy of burning cotton to prevent its falling into the hands of the Federal forces, and it was believed to be in danger of capture by the National troops. Calderwood, the defendant, was a British subject, never having become an American citizen. He, on the ground of neutrality, it was assumed, could protect his own property from being destroyed or appropriated by the parties in conflict. Calderwood signed the note in question, expressing an obligation to pay Dunn a sum of money (\$7580), and Dunn signed a receipt to Calderwood expressing the receipt of \$7580 as being in full payment for sixty-two bales of cotton, weighing in the aggregate twenty-four thousand eight hundred pounds, and for one hundred thousand and eight hundred pounds of "seed cotton unginned."

The written instruments express that Calderwood is bound to pay Dunn fifteen cents per pound in gold for the baled cotton, and \$3780 in gold for the cotton in the seed "so soon as the cotton can be transported to Europe and sold." In one of these instruments Calderwood binds himself to pay Dunn one-half of the net profits made on the sale of said sixty-two bales of cotton, and in the other he binds himself to pay Dunn one-half of the net profits made on the sale of said unginned cotton. One of these acts expresses that Dunn "takes upon himself the risk of the loss of the cotton through the acts of either government; that is, if the cotton be destroyed or taken either by the Government of the United States or by the Confederate States, and

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the value thereof be not recovered by said John Calderwood after exhausting all proper means of redress, then and in that case the note which said Calderwood has this day executed in my favor for \$3700 shall be canceled and be void." The other instrument contains the same stipulation, and declares that after all proper means used by Calderwood to obtain redress the note executed for \$4700 shall be canceled and become void.

In the month of April of the year following the plaintiff's gin house was burned, with the cotton stored in it at the time. There is in the record a large amount of testimony introduced by the plaintiff to establish the quantity of cotton in the gin at the time of the accident, all of which was destroyed by the conflagration. This, he seems to consider, important to show, as he makes the point that the contract entered into by himself and Calderwood was a sale to him completed by delivery, and that the cotton was at the risk of the purchaser. The destruction of the gin by fire and the resulting loss of all the cotton that was in it at the time is shown to have arisen from an accident, and not from the act or through the agency of either of the hostile powers engaged in war.

It is shown that not long before the gin was destroyed the "cotton burners" visited the plaintiff's plantation, and that a small quantity of his cotton was burned by them. The quantity of cotton destroyed by the burning of the gin afterwards, if it were important to ascertain, is involved in uncertainty. It is proved that very shortly before the advent of the burners there had been cotton removed from the plantation. The officer in command of the squad that came to burn the cotton testified that he went into the gin with the plaintiff to look at the cotton, and that they agreed there "were about seventeen bales, seven or eight of it in the lint." Taylor, a witness, testifies that he was present at the time, and says there were not a hundred bales of cotton in the gin at that time. And afterwards witness states that in a conversation with Dunn, the plaintiff, in regard to the quantity of cotton in the gin house when it was burned, he remarked to Dunn that he (witness) did not think there were a hundred bales, or anything like it, at the time. The testimony of the plaintiff and others show that a considerable amount of cotton, both in the bale and in the seed, was removed just before the coming of the burners to keep it out of their way. The accidental burning of the gin occurred a few days afterwards from fire communicated to it from burning timber in close proximity to it. We do not find that during the interval between the appearance of the cotton burners and the destruction of the gin house, any of the cotton removed before their arrival, was carried back to the gin. But we do not regard it important to know what amount of cotton was lost by the accident. We can not regard the agreement

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between the parties as a sale. The written instrument containing the agreement sufficiently shows its character. The cotton was to be considered as belonging to Calderwood if it should be destroyed by the Federal forces, as in that event there would be a chance for Calderwood, a British subject, to recover its value from the United States. If it escaped destruction in that direction, Calderwood was to pay him, after sale of the cotton in Europe, one-half of the *net profits* on the cotton. We conclude the plaintiff has no legal or equitable right to recover.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Mr. Chief Justice Ludeling recused.

No. 183.—D. C. MORGAN, Administrator, v. W. Y. KINNARD et al.

23	645
47	532
23	645
117	503

An act of sale of real property under private signature takes effect against third persons only from the date of registry in the proper office and the delivery of the property. If, therefore, real estate has been sold under act by private signature, and the vendor remains in possession, and the act is not recorded, a third purchaser by public act acquires a good and valid title thereto, notwithstanding the former sale under private signature.

A judicial admission or allegation in the defense to the payment of notes given for the price of land, that the defendant has no title, will not enable a third person who gets possession of such land, without title, to hold it under such judicial admissions. The general rule is, however, well established that judicial confessions, when voluntarily made, are conclusive against the parties making them.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. S. G. Parsons*, for plaintiff and appellee. *Newton & Hall* and *Todd & Brigham*, for defendants and appellants.

LUDELING, C. J. This is a petitory action to recover a tract of land described in the petition. The defendants filed a general denial, and they further alleged that J. T. Payne, now dead, purchased the land at public auction as the property of the estate of James W. Kelly, and that the said Payne and those under whom he holds, have been in possession more than ten years under titles translativ of property.

The evidence in the record establishes the following facts :

That on the twelfth of July, 1856, Mrs. Dicey Kelly executed an act *sons seign privé* in favor of her son, James W. Kelly, transferring the land in controversy ; that the vendor, Dicey Kelly, remained in possession of the property thus transferred until 1861, when she sold the same property to Isaac F. Norrell by notarial act and gave him possession thereof. That James W. Kelly was in the neighborhood at the time of the sale to Norrell ; that he knew of the sale—he was frequently on the place after the sale to Norrell, and that up to the time of his death, in 1864 or 1865, he permitted Norrell to remain in the undisturbed possession of the property.

Article 2442 [2417] of the Civil Code declares “the sale of any im-

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movable made under private signature shall have effect against the creditors of the parties and against third persons in general, only from the day such sale was registered according to law, and the actual delivery of the thing sold took place." 2 An. 912.

The sale under private signature to J. W. Kelly in 1856 had no effect against Isaac F. Norrell who bought from Dicey W. Kelly in 1861, because she had remained in possession from the date of the private act to the time when she sold to Norrell, and therefore he acquired a good title by his purchase in 1861. This view of the case renders it unnecessary to pass upon the bills of exception relative to the reception of testimony to establish the simulation between Dicey Kelly and J. W. Kelly.

It appears from the record that W. Y. Kinnard was appointed administrator of the estate of J. W. Kelly in 1867; that as administrator he sold the property in dispute at public auction, first to Robb & Payne, and afterwards to James T. Payne. The evidence creates at least a strong suspicion that these sales were collusively made between the administrator and Payne. The administrator swears as follows:

"I sold it to Payne in 1869. I made a sale of the place once before. I cried it off under an order and advertisement, but the terms of the sale were not complied with, and I readvertised and sold it again. I don't know whether there was any title given in the first sale or not. I *think* Mr. Payne paid between \$400 and \$500 for the land. * * * Ever since I commenced the administration of the estate I have been cultivating the land, except about forty or fifty acres of bottom land and one hundred acres hill lands. In the sale of the land from me as administrator to Payne, it was understood that I was to be a party interested in the purchase. I was to be one-half owner of it. I borrowed my part of the price from Mr. Payne; paid for the land."

The witness stated on re-examination in chief that his wife was a sister of J. W. Kelly, and that "it was understood that I should use my wife's interest in paying her proportion as far as it would go, she being an heir of J. W. Kelly." This witness swears further that the land in controversy had been transferred to him after the act *sons seign privé* to J. W. Kelly by Dicey Kelly, and that he retransferred the land in order that Mrs. Kelly might sell it to Norrell. He knew all the facts relative to the simulated and null act of Dicey Kelly to J. W. Kelly, and yet he devised schemes to try to sell the property as that of James W. Kelly, deceased. The evidence in this record fully satisfies us that James T. Payne also knew all the facts in relation to the title of James W. Kelly and Isaac F. Norrell.

The former administrator of I. F. Norrell's estate shows directly that Payne did know all about it, and other evidence corroborates his testimony.

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But, be this as it may, the notarial act of sale to Norrell was recorded; the property had been in his possession from February, 1861, to some time in 1866, when he died. The property was inventoried as his after his death, and went into the possession of his administrator, who retained possession until the administrator of J. W. Kelly illegally took possession of it. The sale by Kinnard, administrator, to Payne was the sale of the property of another, and therefore null and void. C. C. 2452.

It is contended that Norrell is estopped from setting up title to this land, because when sued on one of the notes given for the price thereof he alleged that the consideration of the note had failed, inasmuch as he had not received a perfect title; that the land had been previously transferred to J. W. Kelly.

The same witnesses who prove the above facts state that Norrell, during the pendency of the suit, proposed to compromise the note in suit by paying \$2000. It is a general rule that parties are bound by their judicial admissions, and it is also true that admissions made in one suit may sometimes be used in another suit, even though the parties to the suit be not the same. But we are not prepared to say that all admissions made in pleading may be used as an estoppel in every suit in which the party making them may be a party.

This suit is itself an example of the harshness and injustice of the rule contended for. Suppose that judgment had been rendered against Norrell on the note, in spite of his defense, he would have the price to pay, and yet any stranger who might get possession of his land could hold it without a legal title, because Norrell had admitted in the contest for the price that he had no title. Doctrines which lead to such unjust conclusions can not be correct.

The evidence in the record shows that a considerable portion of the lands in controversy are cleared, and that they have been cultivated by the defendants; but the evidence does not fix the quantity of lands cleared or cultivable, so as to enable the court to fix the amount of rents.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

219.—MANHEIM BERWIN v. JOHN L. GAUGER.

The burden of proof falls upon the defendant, when he alleges want or failure of consideration of the note sued upon.

A PPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Wells & Williams* and *E. Filleul*, for plaintiff and appellant. *Richardson & McEnery*, for defendant and appellee.

Howe, J. This was a suit upon a promissory note. The defense

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set up was fraud and want of consideration. A reconventional demand was also pleaded. There was judgment dismissing the plaintiff's demand as in case of nonsuit, and he has appealed.

We are constrained to think that the judgment was erroneous. The plaintiff's case was fully made out by the note itself, and by his answers to interrogatories propounded by defendant and introduced by plaintiff without objection, as appears by the note of evidence. The defendant has not successfully contradicted this array of proof, nor established the affirmative allegations of his answer, the burden of proving which was upon the defense. His own testimony is loose and vague, and the other testimony on his side is insufficient to eke out his case.

It is therefore ordered that the judgment appealed from be reversed and the demand of defendant dismissed, and that plaintiff Manheim Berwin recover from defendant John L. Gauger the sum of \$857 20, with eight per cent. per annum interest from February 27, 1867, and costs of both courts.

Rehearing refused.

No. 215.—PARISH OF MOREHOUSE v. PARISH OF RICHLAND.

After the passage of the act of the twenty-ninth of September, 1868, creating the parish of Richland, the people living within the limits of that portion of the new parish which was detached from the parish of Morehouse were required to pay the taxes due by them to the authorities of the parish of Richland. This act being valid, the parish of Morehouse had no right to collect taxes thereafter from the people thus detached.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. W. H. Compton*, district attorney *pro tem.*, and *J. & S. D. McEnery*, for plaintiff and appellant. *Todd & Potts*, for defendant and appellee.

LUDELING, C. J. On the twenty-ninth of September, 1868, an act of the General Assembly was passed creating the parish of Richland. By a provision of the act the taxes which were due by the people living in the territory detached from Morehouse to form Richland parish, when the collector of taxes for Richland parish should be commissioned, were to be collected by said tax collector, and he is directed to pay the State taxes to the State Treasurer and the parish taxes to the treasurer of the parish of Richland. The plaintiff claims the money thus collected and paid into the treasury of the parish of Richland.

We are at a loss to imagine by what right the parish of Morehouse sets up a claim to the taxes collected from the citizens of Richland and paid into the treasury of said parish under the authority of an act of the General Assembly which is unquestionably valid.

It is therefore ordered and adjudged that the judgment of the court *a qua* be affirmed, with costs of appeal.

Smith v. Henderson et als.

No. 197.—B. W. SMITH v. E. L. HENDERSON et als.

One judgment creditor may attack the judgment of another creditor of the common debtor and show its nullity on the ground that its consideration was based on an obligation given for the sale of slaves.

A judgment that has been given predicated on a slave contract or a slave consideration is null and void, and its enforcement or execution by the court that rendered it is prohibited by article 128 of the constitution of 1868. (Article 149 of the constitution, which declares all judgments valid and binding which were rendered by the courts of the State during the period of the late civil war, only gives validity to such judgments as were based on a lawful consideration. It having been first settled by the highest judicial tribunal of the State, and afterward enacted into the organic law by the convention which framed the constitution, that an obligation or contract predicated on slaves was illegal and void, it is therefore held that judgments of inferior courts which were rendered before these decrees and enactments were made, based on contracts or obligations for the sale of slaves, were absolutely null in themselves, and that all such judgments are included in the prohibition of article 128 of the constitution.)

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Crawford, J. S. G. Parsons*, for plaintiff. *C. T. Dunn*, for defendants.

LUDELING, C. J The record in this case was destroyed with the court house by fire, and the parties have submitted this appeal on a statement of facts

It appears that Henderson had a judgment against Benjamin Temple and others. That having issued execution, under this judgment, and seized all the property of said Temple, B. W. Smith, another judgment creditor of Benjamin Temple, enjoined the sale, on the grounds that the judgment was based on obligations given for the price of slaves, that the property seized was subject to a judicial mortgage resulting from the registration of his judgment against Benjamin Temple, that the property seized was insufficient to satisfy both judgments, and that the sale thereof would result to his injury, and he prayed that the judgment of Henderson might be annulled, and that his injunction might be perpetuated.

A motion to dissolve this injunction, on the face of the papers, was filed, and the prescription of one year against the right to sue for the nullity of the judgment was pleaded. That admitted the truth of the allegations of the petition.

The question presented for decision is, whether one judgment creditor, with a judicial mortgage on property of the common debtor, can interpose to prevent the execution of the judgment of another creditor, on the ground that said judgment was rendered on obligations given for the price of persons, when it is shown that the property of the common debtor is insufficient to pay both judgments.

The plaintiff contends that under the jurisprudence of this State, settled before the adoption of the constitution, such obligations were invalid and void, and that article 128 of the constitution declared them

null and void, and prohibited the courts of this State from enforcing all such obligations.

The defendant, on the other hand, invokes article 149 of the constitution as recognizing the right to enforce *all judgments* rendered between the twenty-sixth of January, 1861, and the date when the constitution was adopted.

It is evident that this construction of article 149 of the constitution would make it conflict with articles 127 and 128 of the constitution. These articles declare that "*all contracts* for the sale of persons or for Confederate treasury notes are null and void," and they prohibit the courts of this State from enforcing such contracts.

"A judgment neither creates, adds to nor detracts from the debt of the party against whom it is rendered. It only declares its existence, fixes its amount and secures to the creditor the means of enforcing its payment." 10 R. 412; *Gustine v. Union Bank of Louisiana*, 18 L. R. 414; 9 Rob. 119

It is a necessary step to enforce obligations, and without which courts can not enforce them.

If, therefore, the courts lend their aid to execute judgments they necessarily enforce the contracts which form the basis of the judgments.

In construing a law or a constitution, we should so interpret it as to make all its parts harmonize if possible. The construction contended for by defendants should be rejected, therefore, if the article be susceptible of any other which will make it harmonize with articles 127 and 128 of the constitution.

Article 149 was intended as a statute of repose in all matters when not inconsistent with the provisions of the constitution itself. It was intended to cure defects in proceedings resulting from the supposed want of authority in the officers in power in the State during the rebellion, and after, up to the period when the constitution was adopted, and all other defects which it was competent for the State, in the exercise of its limited sovereign power, to cure. But it was not designed to apply to judgments or judicial proceedings *radically null*. For instance, it could not have been intended to validate a judgment rendered on a forged instrument, or a judicial sale without any judgment or order whatever. At the period when the convention which framed the constitution was convoked, it had been repeatedly decided that obligations for the sale of persons were invalid. The convention manifested its approval of those decisions by incorporating in the constitution articles 127 and 128. If the jurisprudence of Louisiana on the subject of obligations for slaves and for Confederate money had not been regarded as correctly settled, in accordance with the views expressed in *Wainright v. Bridges* and other cases, it is quite certain

that those articles would not have been incorporated in the constitution; for, if those obligations were valid, the convention had not the power to impair them under the Constitution of the United States. They had not the power to impair the obligation of a contract, whether evidenced by a note or judgment.

It can not be presumed that the members of the Constitutional Convention were ignorant of the fact that before this court had decided the case of *Wainright v. Bridges*, judgments recognizing the validity of obligations for slaves had been rendered throughout the State; nor can it be presumed that, knowing this, the Convention intended that courts should enforce these contracts which were in judgments, when they emphatically declared "all contracts for the sale of persons null and void," and prohibited their enforcement by the courts of this State. What is clear in one part of the law may be called in aid to explain what is doubtful in another. C. C. art. 17.

But this question has already been decided. In *Henderson v. Montgomery*, this court said: "We consider that there is nothing now to sustain an appeal; that the judgment or order appealed from being in conflict with the fundamental and paramount law of the land, is an utter nullity, and the parties must be left where they were when it was struck with nullity. 18 An. 211.

In *Thomas v. Hacket*, we held that a twelve months' bond, on which a *fiery facias* had been issued, and a part of it had been collected, was invalid, and we ordered the cancellation of the mortgage resulting from its registry because it was given for slaves sold at a sheriff's sale. 21 An. 164. In *Sandidge v. Sanderson*, 21 An. 757, *Satterfield v. Spurlock*, 22 An. 771, and numerous other cases, this court has perpetuated injunctions arresting the sales of property under orders of seizures and sales, on the ground that slave contracts could not be enforced in this State. And in *Henderson v. Mutual Insurance Company*, we held that one judgment creditor could attack the judgment of another creditor of the common debtor and show that the judgment was a nullity because predicated on Confederate money, the court said: "Admitting the correctness of the legal position assumed by him, he is successfully met by the plea to the validity of his judgment which is not yet executed. His answers to the interrogatories leave no doubt that the said judgment was based on a contract or agreement the consideration of which was Confederate money, and is therefore null. To render the decree asked for by him would be to enforce a prohibited agreement. Article 127 Constitution; 23 An. Thus the question has been decided in almost every shape that it could be presented.

It is therefore ordered and adjudged that the judgment of the district court be annulled, and that there be judgment in favor of the plaintiff perpetuating the injunction, and for costs of both courts.

WYLY, J., *dissenting*. The plaintiff, a judgment creditor of Benjamin Temple, of date June, 1869, enjoins the execution of the other judgment creditor, Mrs. E. L. Henderson, of date and registry June, 1866, on the ground that the property of Temple, the common debtor, seized by the defendants, will not be sufficient to pay both judicial mortgages, the defendant's (Mrs. Henderson) mortgage being prior in rank according to registry; but that her judgment is based upon a debt for the price of a slave and can not be enforced by the courts, and that the sale of the property thereunder will damage the plaintiff, it being the only property of said Temple.

The proceeding seems to be anomalous. It is not an action to annul the judgment, whose execution the plaintiff, a third party, has restrained by the writ of injunction sued out by him. Temple, the common debtor, is not made party to this attack upon the judgment of Mrs. E. L. Henderson against him. If the plaintiff succeeds in having the judgment, attacked in this collateral manner, declared a nullity, the decree will not have the force and effect of the thing adjudged between Mrs. Henderson and her judgment debtor, Temple. The man whose property has been seized by his judgment debtor will not have the benefit of the decree invalidating the judgment against him, under which the seizure was levied. The only law we have authorizing a third party to oppose the sale of property under a judgment of court is to be found in the Code of Practice.

Article 395 declares that "this opposition is a demand brought by a third person, not originally a party in the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him."

Article 396 declares that "such opposition may take place in two cases:

"I. When the third person making the opposition pretends to be the owner of the thing which has been seized.

"II. When he contends that he has a privilege on the proceeds of the thing seized and sold."

If the third person claims the property he may enjoin the sale, and in such proceeding this opposition shall be considered as a separate demand. C. P. 400, 398.

"If, on the contrary, the opposition be made on the ground that the third opponent has a privilege which entitles him to be paid in preference to the party making the seizure out of the proceeds of the sale of the property, as when there are several seizures or conflicting claims on the same property, such opposition may be made by motion, of which due notice must be given both to the party who has made the seizure and to the sheriff; and the court, without requiring any secu-

rity from the third opponent, shall direct the sheriff to retain in his hands, subject to further order, the proceeds of the sale." C. P. 401.

The right of this third opponent does not arise under either of the provisions of article 396. He does not claim the thing, and therefore has no right to oppose and enjoin the sale. He does not claim a privilege on the proceeds of the sale superior to Mrs. Henderson, the seizing creditor; if he did, it would be no cause to enjoin the sale. A senior mortgage creditor can not prevent the sale of the common debtor's property under a seizure of the junior mortgage creditor. His remedy, under article 401, is on the proceeds in the hands of the sheriff.

Here the plaintiff, without ever causing execution to issue on his own judgment, proposes to suspend the execution of Mrs. Henderson's judgment against her judgment debtor, Temple, on the mere suggestion of a defense which Temple never cared to oppose to his creditor, Mrs. Henderson, at the trial in 1866.

Here the third opponent, under a judgment in 1869 on a debt contracted in 1866, seeks by a collateral attack to have the debt on which Mrs. Henderson's judgment was based for a slave, contracted before the war, long anterior to his own claim, declared an absolute nullity, notwithstanding article 1993 of the Revised Civil Code declares that "no creditor can, by the action given by this section, sue individually to annul any contract made before the time his debt accrued." From the evidence I have no doubt that the debt for the slave, on which the judgment of Mrs. Henderson is founded, was long anterior to the time the debt of the plaintiff was contracted.

This court has repeatedly decided under the article quoted that an inquiry into the consideration of an anterior contract can not be instituted by a creditor subsequently acquiring rights against the same debtor.

The judgment of a court of competent jurisdiction unappealed from, where the parties have been cited, is not and never can be an absolute nullity. It can only be attacked in the action of nullity provided by the articles of the Code of Practice under the title "Of the nullity of judgments."

Article 604: "One may demand the nullity of a judgment for any of the causes provided in this section, even if no appeal have been taken from the same or if the delay for taking the same have expired."

Article 605: "The causes for which the nullity of a definitive judgment may be demanded are two-fold: Those that are relative to the form of proceeding, and those that appertain to the merits of the question tried."

The vices of form are detailed in article 606.

Article 607 declares that "a definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud

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or other ill practices on the part of the party in whose favor it was rendered; as if he obtained the same by bribing the judge or the witnesses, or by producing forged documents or by denying having received the payment of a sum, the receipt of which the defendant had lost or could not find at the time, but has found since the rendering of the judgment."

It is not pretended that the judgment enjoined is affected by vices of form. C. P. 606. There is no allegation that it was obtained through fraud or other ill practices of Mrs. E. L. Henderson, or is liable to nullity under article 607, C. P. Indeed, the debtor in the judgment sought to be declared a nullity is not a party to this proceeding, and the plaintiff does not pretend to sue under the articles of the Code of Practice under the title "Of the nullity of judgments."

I think the proceeding most extraordinary and such as is not warranted by law.

We can not get before the court the consideration of the debt merged in the judgment in the proceeding before us. The inquiry can not be instituted except by opening the judgment in the manner provided by law. The action of nullity is the only mode provided by law to revise a judgment after the time for appeal has passed; and until it is legally opened for revision we can have no legal knowledge of the evidence on which it was rendered.

"A judgment is the highest evidence of a debt, and the title merges in the judgment. So, where judgment is had upon a note, the latter is merged in the former, from which only by its reversal or rescission can it be severed. So, too, a judgment in an action on which a judgment is rendered is merged in the latter; the debtor can not then plead against the claim thus merged in the judgment any prescription but that which bars the latter." 9 La. 418; 1 An. 372; 3 An. 386; 7 An. 334; 9 An. 339; 12 An. 736; 14 An. 205, 231, 261; also authorities collated, Hen. Dig. 726, No. 6.

All irregularities or defects in the proceedings anterior to judgment, except the entire want of citation, must be corrected by appeal or in some direct proceeding instituted to set aside said decree. 2 R. 503.

There is no doubt of the slave consideration of the debt on which the judgment attacked was based. It was a defense that might have been urged at the trial; it can not be urged now as a ground for injunction. The writ of injunction may be used as a means to protect a person in the enjoyment of some right or thing already in possession of the party suing it out. It ought not to be used merely for the purpose of suspending indefinitely the execution of a judgment of the court that has not been annulled and is not sought to be annulled according to the provisions of the Code of Practice.

The fallacy of the reasoning of the counsel of the plaintiff is in supposing that a judgment is but the evidence of a debt, and that its slave consideration or the slave consideration of the note on which it was based may be judicially ascertained independently of the articles of the Code of Practice, and when ascertained it may be declared an absolute nullity, or its execution may be indefinitely suspended, as in the case before us, by a third party without an action of nullity.

I do not think the court ought to entertain irregular suggestions of the invalidity of judgments and perpetually bar their execution. I think a judgment is not only the most solemn evidence of an indebtedness, but it is also the fiat of the sovereign peremptorily commanding its payment. It is the mandate of the State ordering the enforcement of the debt found to be due the creditor after full hearing of the parties and the evidence, which debt becomes merged in the judgment and can not be severed therefrom.

The judgment whose execution has been arrested by the injunction of the plaintiff has already been enforced, so far as the courts of the State are concerned. The debt already had the fiat or warrant of the sovereign for its enforcement. In 1866 the judgment became final; it acquired the force and effect of the thing adjudged. There was no prohibitory law at that time forbidding the courts from giving the sanction of the State to debts for the price of slaves. No prohibitory law subsequently enacted can affect the judgment rendered in 1866. If article 128 of the Constitution be held to have that effect it will deprive the plaintiff of her mortgage right, which she had previously acquired; it will impair the obligation of a contract and violate the Constitution of the United States, the paramount law of the land. But I do not believe that article 128 has any application to the judgment before us; it applies to contracts to be enforced subsequent to the adoption of the Constitution. So far from intending to invalidate judgments existing at the time of the adoption of the Constitution, I think it was the express purpose of the framers of our Constitution to validate them. Article 149 of the Constitution I regard as conclusive on this point. It declares that: "All rights, actions, prosecutions, claims, contracts and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, shall continue as if it had not been adopted; *all judgments* and judicial sales, marriages and *executed contracts*, made in good faith and in accordance with existing laws in this State, rendered, made or entered into between the twenty-sixth day of January, 1861, and the date when this Constitution shall be adopted, *are hereby declared to be valid*, except the following," etc.

I therefore feel it my duty to dissent in this case.

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/
No. 269.—CATHERINE D. DOWD v. ELSTNER, KINSWORTHY & CO.

In this case three parties, A, B and C, formed a commercial partnership, each placing in the firm to his individual credit, and to be under his individual control, an equal amount of the capital stock. By an article of the partnership it was acknowledged that three thousand dollars of the capital stock belonging to C was borrowed from D, for which the firm bound itself on its dissolution to pay. At or before the dissolution of the firm C drew out all his capital, including the amount which was owing to D. After the firm was dissolved, D brought suit for the three thousand dollars against each member of the firm on the promise and acknowledgment in the articles of partnership. Held—That D could not recover because the article of the partnership which acknowledged the indebtedness to D gave to C the exclusive control of his own capital in the partnership, which he had withdrawn before suit was brought.

Held further—That under the allegations in the petition of D that she loaned the money to C individually, evidence to show the fact that C had withdrawn the same before suit was brought was admissible in a suit to hold the firm liable.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Land & Taylor*, for plaintiff and appellant. *Nutt & Leonard*, for defendants and appellees.

Howe, J. The plaintiff alleged in her petition, filed April 28, 1869, that the defendants' firm, composed of J. C. and W. H. Elstner and B. H. Kinsworthy, was organized in 1866; that she loaned and advanced to B. H. Kinsworthy the sum of three thousand dollars to enable him to furnish the amount of capital he contributed to the partnership; that when the partnership was actually formed, on the twenty-sixth of April, 1866, the firm of Elstner, Kinsworthy & Co. credited petitioner with the sum of three thousand dollars, and bound itself in writing to pay the same whenever the partnership should be dissolved, and that the partnership was dissolved on the first of May, 1867. She therefore demanded the amount with interest.

J. C. Elstner and W. H. Elstner answered by a general denial, and the curator *ad hoc* of B. H. Kinsworthy filed a similar defense.

There was judgment for defendants, and plaintiff appealed.

The only evidence offered by plaintiff consisted of the written articles of partnership of the defendants' firm, dated April 26, 1866. It was admitted that the firm was dissolved in May, 1867. The third article of the agreement of partnership is the one on which plaintiff relies, and is in these words:

“It is agreed between the said parties that the cash capital to be employed by them in the said copartnership business shall be the sum of twenty-seven thousand dollars (\$27,000), now already invested in the said business, which is hereby acknowledged and recognized as standing to the credit of the following named persons on the books of the said firm, as follows, viz: The sum of eighteen thousand dollars (\$18,000) to the credit of the said John C. Elstner, nine thousand dollars of which is to represent the interest of the said John C. Elstner, and nine thousand dollars of which is to represent the interest of the said William H. Elstner, and the sum of six thousand dollars to the

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credit of David R. Coulter, for the use and benefit of Rebecca J. Kinsworthy, and the sum of three thousand dollars to the credit of Catherine D. Dowd, amounting together to the sum of nine thousand dollars, which is to represent the interest of the said Burton H. Kinsworthy, who is to have the control of the same, and is to have the benefit of all profits arising from the same."

On the part of the defendants it was proved that after the partnership was dissolved in 1867, its affairs were put in liquidation and that B. H. Kinsworthy withdrew from the assets his share of the capital stock (\$9000), of which the amount loaned him by plaintiff and mentioned in the article above quoted (\$3000) formed a part, and this before the commencement of this suit.

The plaintiff reserved a bill of exceptions to the admission of the testimony to show that B. H. Kinsworthy had thus drawn out his share, on the ground of irrelevancy; but we think the objection was properly overruled. The plaintiff, herself, alleges that she loaned the sum sued for to Kinsworthy, and the only evidence she offers of a liability of the firm to her for the amount is the article above quoted. But this article gives Kinsworthy the control of the share of capital recognized as his, and it was certainly relevant to show that he drew the amount from the liquidation before the plaintiff ever signified her intention to make a claim under the stipulations of the articles of partnership, to which she was not a party.

Nor do we perceive any error in the judgment appealed from. The plaintiff loaned her money to Kinsworthy. She was no party to the agreement of April 26, 1866, under which she claims. She never accepted its stipulations, except by instituting this suit three years afterwards, and after the firm had been liquidated and the amount she had loaned to Kinsworthy, and which he had contributed to the partnership, had been refunded to him as the person entitled to control it.

Judgment affirmed.

No. 238.—RUTH RAINS v. JOHN CHAFFE & BROTHER et al.

A third person who claims by way of third opposition the proceeds of the sale of property is not required to make oath to the facts upon which he bases his demand in order to arrest the proceeds in the hands of the sheriff pending the inquiry.

Either the party to the suit or his attorney may make oath to the absence of the district judge from the parish.

APPEAL from the Fourteenth Judicial District Court, parish of Richland. *Ray, J. Todd & Brigham*, for plaintiff and appellant. *Garrett & Garrett*, for defendants and appellees.

HOWELL, J. The first question presented in this case is, whether or not a third person claiming by opposition the proceeds of a sale. upon

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which he asserts a superior right, must make oath to the facts upon which he basis his demand and arrests said proceeds in the hands of the sheriff. The articles of the Code of Practice, 395-403, authorizing the proceeding and regulating its exercise and effects, make no such requirement, and we are aware of no law which does. The statute relating to the subject permits either the party or his attorney to make oath as to the absence of the district judge. R. S., § —.

It is therefore ordered that the judgment appealed from be reversed, and this cause remanded to be proceeded with according to law, defendants and appellees to pay costs of appeal.

No. 88.—M. M. CALDERWOOD, Executrix, v. WILLIAM CALDERWOOD et als.

The price, the thing and the consent are essential elements of the *vente a remere* as well as of an unconditional sale.

The right of redemption constitutes a resolatory and not a suspensive condition, and the purchaser, therefore, becomes at once proprietor, and can exercise all the rights of property, including the right of disposition.

The consent, which is the essence of the contract of sale, consists in the concurrence of the vendor's volition to sell a particular thing for a particular price and of the vendee to purchase the same for the same price.

When, therefore, J. C. made a contract with W. C. in the form of a sale of lands, but by a counter letter of even date it appeared (1) that the real intent of the parties was to secure the payment of a debt which remained unextinguished; (2), that the amount of the nominal price over and above this debt was not serious; (3), that the vendee, so-called, was not invested with the right of disposition; and (4), that there was really no consent of J. C. to sell or of W. C. to buy. Held—That the effect of the two instruments together was to constitute an antichresis, and not a *vente a remere*.

In the absence of the stipulation respecting interest permitted by R. C. C. 3180, the disposition of the revenues of the pledged immovable is governed by article 3176.

Parol evidence is inadmissible against or beyond what is contained in the acts, and in regard to what may have been said before, at the time of or after their execution.

Property in litigation can not be alienated to the prejudice of the claimant.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Ray, J. Stubbs & Cobb, for plaintiff and appellee. Garrett & Garrett, for defendants, appellants.

WYLY, J. On the twenty-eighth of May, 1866, John Calderwood made a contract in the form of a sale with his brother, William Calderwood, in reference to certain stores and other property in Monroe, and at the same time a counter letter was executed and signed by them in order "to certify and explain the true intent and object of the parties to said act of sale, to wit: whereas, John Calderwood is indebted unto William Calderwood in the sum of twenty-four hundred and seventy dollars in United States treasury notes for services; now, therefore, the aforesaid sale and transfer is made to secure and guarantee the payment of said sum of money. And the said William Calderwood does hereby obligate himself not to sell any

23	658
47	1040

23	658
50	1125

23	658
125	980

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part of said above described property without the consent of John Calderwood, and that when any part of said property shall have been sold, the price to the extent of twenty-four hundred and seventy dollars shall be retained by said William Calderwood, and the remainder shall be paid or turned over to John Calderwood, his heirs or assigns, provided the said John Calderwood shall first return to William Calderwood, his heirs or executors, his note given for the credit portion of the price or secure him against the payment thereof. And the said William Calderwood does hereby further obligate himself, his heirs and executors, to retransfer unto John Calderwood, his heirs or assigns, or legal representatives, the property aforesaid whenever he, the said William Calderwood, shall have been paid the twenty-four hundred and seventy dollars, and that he will not mortgage or encumber said property to the prejudice of said John Calderwood, his heirs or legal representatives."

The plaintiff, the executrix and universal legatee of John Calderwood, sues to compel the retransfer of the property according to the stipulation of the counter letter, alleging that by the rents derived from said property since twenty-eighth of May, 1866, William Calderwood has received largely more than the amount for which the property was given to him in pledge.

The defendant, William Calderwood, denies that the contract was a pledge, but contends it was a sale, with the right of redemption—*à vente à réméré*; that as owner, the fruits or revenues belong to him, and he is not bound to reconvey the property until the repayment of the twenty-four hundred and seventy dollars as stipulated, which the plaintiff has failed to tender.

He sought by parol evidence to prove that this was the intention of the parties, and the court very properly rejected the evidence of the witnesses. Parol evidence will not be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since. C. C. 2256. Looking beyond the mere form of the contract, we see in the counter letter the real intention of the parties. In that instrument we see that the creditor is put in possession of certain immovable property as a security for his debt, but he can not sell it or mortgage it. He is not invested with the right of disposition, which is the essence of the ownership of a thing. Use, usufruct and the right of disposition are the elements of perfect ownership. By the counter letter this right of disposition, which is *necessary* for a sale, remains in John Calderwood; it was not delegated to William Calderwood, because he could not *consent* to a sale to any one else; the consent had yet to be given by John Calderwood, notwithstanding the contract.

We do not see in the contract the obligation of the buyer to pay the

price as mentioned in the act of sale, to wit: the note for \$4030; this was not a serious engagement according to the terms of the counter letter. It was not intended to be paid.

But the strongest position is, the contract wants the consent of the parties in relation to the sale itself. The essence of the contract of sale consists in the concurrence of the seller's will to sell a particular thing for a particular price, and of the buyer to buy it for that price; there can be no contract of sale if it appears, as in the counter letter, that the intention of the parties is neither to buy nor to sell, but rather to disguise another contract under the false appearance of the contract of sale. See Cushing's Translation of Pothier on Sales, pages 1, 11, 17, 22, 25.

The idea of a sale is utterly precluded if effect be given to that clause of the counter letter which says: "Whereas, John Calderwood *is indebted* unto William Calderwood in the sum of twenty-four hundred and seventy dollars in United States treasury notes for services. Now, therefore, the aforesaid sale and transfer is made *to secure and guarantee the payment of said sum of money.*"

It is also precluded if effect be given to the other clause, which says in substance the right to consent to a sale still remains in John Calderwood; it is not invested in William Calderwood. The ownership is not transferred if the right of disposition or the right freely to consent to a subsequent sale and to exercise it independently is not conveyed in the contract. Then when a sale shall have been effected on the consent of John Calderwood, by another clause of the counter letter William Calderwood is not to get the price, he is only to receive the amount due him by John Calderwood, to wit: \$2470. Again, there is another stipulation precluding William Calderwood from encumbering the property and binding him to reconvey the paper title, the apparent title, to John Calderwood, his heirs or legal representatives, whenever he, William Calderwood, shall have been paid.

In every one of these leading stipulations of the counter letter the idea prevails that John Calderwood owns the property, and has put it in possession of William Calderwood merely to secure the debt subsisting in favor of the latter for \$2470. Not one word is said in that instrument, in which is to be found the true intent and object of the parties, according to their express declaration, about the payment of the \$4030 represented by the note of William Calderwood as part of the price. They refer to that note as a document to be given up when the real purpose of the contract shall have been accomplished, to wit: when William Calderwood is paid and the property is returned to John Calderwood. No hint or intimation is conveyed in the counter letter that William Calderwood is upon any contingency to become the true owner.

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If the contract be a sale what is the use of talking about securing a subsisting debt of \$2470? That being paid as part of the price, ceased to be a debt; by the sale the obligation would be discharged, which the sole purpose of the counter letter, it seems, was to preserve and to secure.

Looking to the instrument wherein the parties have reposed their true intention and object, we say there was neither an intention to buy nor to sell, but rather to disguise the contract of pledge under the false appearance of the contract of sale. It is the real, not the apparent, contract which is sought to be enforced and which should be enforced.

If there was no sale for want of the essential elements, there can not be a modified or conditional sale—a sale *à réméré*.

The price, the consent and the thing are just as essential in the *vente à réméré* as in an unconditional sale.

Authorities are not wanting in support of this position. Favard, *verbo*, "Faculté de Rachat," says: "The stipulation of the faculty of redemption in the contract of sale does not prevent the property or proprietorship of the thing from being transmitted in entirety to the purchaser. It is in this respect that the sale with the right of redemption differs from the contract of pledge or antichresis, which gives the pledgee only the possession of the thing pledged, and the right to reap the fruits and revenues until the termination of the pledge." Lahaye's Notes to Code Napoléon, article 1659. Dalloz on sale, No. 825, says: "The right of redemption constitutes a resolutive condition and not a suspensive. In consequence the purchaser becomes immediately proprietor. He can exercise all the rights of property. He can sell, subject to a resolution, in case the right of redemption be exercised. Until the exercise of the right of redemption it is the purchaser alone who can dispose of the property."

We have thus seen that the right of disposition or the proprietorship of the thing never passed out of John Calderwood; consequently the fruits and revenues thereof belong to his succession. William Calderwood holds the property, which is immovable, by a contract of pledge, disguised, however, under the form of a sale. It is an antichresis by which contract he acquires "the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt." Revised Civil Code, article 3176.

The evidence shows that the rents and revenues derived by William Calderwood under this contract exceed the amount of his debt and interest, together with the taxes, necessary repairs and other charges paid by him. The debt for which the property was given in pledge

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being thus discharged, the antichresis has terminated. The property should be returned to the owner, and the pledgee should be required also to restore the amount of the rents received by him in excess of the sum which he is entitled to retain as pledgee. "The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor, but he can not appropriate them to his own use; he is bound, on the contrary, to give an account of them to the debtor or to deduct them from what may be due to him." Revised Civil Code 3135.

It appears, however, that on the thirteenth day of February, 1869, William Calderwood sold the property involved in this suit to Mrs. F. A. Richardson, the other defendant herein, and she claims it in this controversy by virtue of said purchase.

From the evidence, we entirely concur with the district judge that that conveyance was collusive, fraudulent and simulated; that this pretended purchaser was merely interposed to defeat the plaintiff, who had already set up claim in court for the property, and had caused it to be sequestered. "The thing claimed as the property of the claimant can not be alienated pending the action so as to prejudice his right. If judgment be rendered for him, the sale is considered as the sale of another's property, and does not prevent him from being put in possession by virtue of such judgment." Revised Civil Code, art. 2453.

From the evidence, we are not able to determine the exact amount of fruits or revenues derived by William Calderwood from the property in excess of the amount he was entitled to receive under the contract of pledge. We think that he has undoubtedly received more than was sufficient to discharge his antichresis, and that the court *a qua* did not err in entering judgment for the property in favor of the plaintiff, and in reserving her right to claim in a separate action the fruits and revenues received by the pledgee in excess of the amount due under the contract of pledge.

It is therefore ordered that the judgment herein be affirmed, with costs. Revised Civil Code, articles 3133, 3152, 3176, 3177, 3178, 3179, 2439, 2464; 1 N. S. 417; Livingston v. Story, 11 Peters 377; 10 An. 691; 3 An. 252; 8 La. 14; 8 N. S. 136; 2 An. 265; 7 An. 579; 9 An. 278.

The Chief Justice was recused in this case.

ON APPLICATION FOR REHEARING.

WYLY, J. Having decided that the contract was not a sale, but a pledge of immovable property, it follows that the owner of the thing owns the revenues thereof. The owner of the debt or claim owns the interest or fruits thereof. It is very true that by article 3180 R. C. C.,

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the creditor and debtor in a pledge of immovables may agree that the fruits or revenues shall be compensated with the interest in whole or in part, and that "this covenant may be performed as every other not prohibited by law." But in the absence of such a covenant in the contract of pledge, shall we say that the owner of the thing shall not have its fruits? It was perfectly lawful for the creditor to agree that his debt shall not bear interest, the principal being secured by the pledge, but shall we say that he did so in the absence of a covenant to that effect? Because article 3180 permits the creditor and debtor in a pledge to stipulate that the revenues of the thing shall compensate or set off the interest, shall we say that the parties availed themselves of that privilege, in the absence of a clause to that effect in the contract of pledge? Persons are presumed to contract in reference to the law. The pledge of a movable is a pawn, the pledge of an immovable is an antichresis. R. C. C. 3135.

"The creditor acquires by this contract (antichresis) the right of reaping the fruits or revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt." R. C. C. 3176. The contract being a pledge of immovables, is regulated by this article, in the absence of the stipulation or covenant permitted by article 3180. The law regulates the effect of a contract except in such cases as the same may be modified by the covenant of the parties under the law permitting the said modification. The parties have not modified the antichresis in the case before us by a covenant under article 3180, and we therefore conclude that it must be regulated by article 3176. We see no reason to grant a rehearing.

Rehearing refused.

No. 198.—THE STATE OF LOUISIANA v. FRED. ENDOM.

23	663
112	227

Those parts of section twenty, twenty-one, twenty-two and twenty-three of the revenue law of 1869, which authorize the levying and collecting of a specific tax on drays, wagons, carriages, etc., in proportion to the number of animals used in drawing them, are contrary to article 118 of the constitution, and are therefore null and void.

Such tax is a license on the particular calling, but if it were not it would still be obnoxious to the constitution, which requires that all licenses on the same occupation or calling shall be uniform, while the classification according to the number of animals used in drawing any particular vehicle imposes greater or less burdens on one person than another pursuing the same occupation.

A PPEAL from the Parish Court, parish of Onachita. *R. J. Caldwell*, Parish Judge. *W. W. Farmer*, District Attorney, and *A. L. Slack*, District Attorney *pro tem.*, for the State, appellant. *Stubbs & Cobb*, for defendant and appellee.

LUDELING, C. J. This is an action to enforce the collection of \$170 for licenses for the year 1870, under the enumerations or classifications

twentieth, twenty-first, twenty-second and twenty-third of section three of the act number 114 of the General Assembly of 1869.

The defense is that the portions of section three of the act aforesaid are unconstitutional.

The parts of section three referred to read as follows:

“There shall be levied and collected an annual amount *as license*, first,” etc:

“*Twentieth*—From every dray, cart, one horse wagon, used for hire, ten dollars.

“*Twenty-first*—From every dray, wagon, truck or other vehicle, used for hauling lumber, produce or material of any kind, drawn by two or more horses and used for hire, twenty dollars.

“*Twenty-second*—From every public or private hack, or other vehicle drawn by one horse and used for hire, ten dollars.

“*Twenty-third*—From every public carriage, stage or omnibus, drawn by two or more horses, used for hire, twenty dollars. From each private carriage or buggy drawn by one horse, five dollars; and when drawn by two horses, ten dollars.”

It is contended by the defendant that this is a direct and specific tax on the articles enumerated, while the attorney for the State insists that it is a *license* for the exercise of an occupation or trade.

It is called a *license* at the beginning of section three, and that section is in that part of the law relating to persons, trades, professions and occupations subject to taxation. On the other hand, from the terms of the law the license is to be levied and collected from the *objects* enumerated. But it is immaterial whether it be a specific tax, or tax on trades, occupations, etc. In either case it violates the constitution. It was no doubt intended to be a tax on occupations or trades. In that event it is a license for the right or privilege to pursue the several callings taxed, and the tax for this privilege must be *the same* for all persons who engage in the business, without reference to the amount of capital invested or business done. If A keeps one dray and B keeps two drays, they both follow the *same* occupation or business, and it would be unequal to tax one more than the other for the privilege of engaging in it. To do so would be not to tax the business, but the drays owned by each.

We think, with the parish judge, that the evidence shows that defendant is following several different occupations; but we are constrained to declare that the parts of section three of the act number 114 of the General Assembly of 1869, numbered twentieth, twenty-first, twenty-second and twenty-third, are unconstitutional, null and void. Art. 118, constitution.

It is therefore ordered and adjudged that the judgment of the parish court be affirmed.

No. 181.—H. WARE & SON v. A. P. MORRIS.

To constitute a sale there must be a consent to sell, that is, the vendor's volition to sell and the vendee's to buy must concur.

A document in the form of a sale, but shown by a counter letter to have been executed with no intention either on the part of one party to buy or of the other to sell, can not be a contract of sale.

It may be lawful to secure a debt by an instrument in the form of a contract of sale, but such an instrument is not in reality an act of sale, but of pledge or hypothecation.

Where such an hypothecary right merely exists, an action by the pretended vendee for the land can not be maintained, nor will the pretended vendor be estopped from showing the merely hypothecary character of the contract by the fact that he had gone into bankruptcy without surrendering the land on which the right had been granted.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Newton & Hall*, for plaintiffs and appellants. *S. G. Parsons* and *D. O. Morgan*, for defendant and appellee.

WYLY, J. On the sixth day of April, 1867, the plaintiffs and the defendant made a contract in the form of a sale, in which, for the price of two thousand dollars, the defendant conveyed to the plaintiffs the plantation described in the petition, together "with all the crops, stock, mules, horses, agricultural implements and all the buildings and improvements thereon." On the same day they executed and signed the following counter letter, explaining the true intent and real object of said contract, to wit:

"This agreement, made and entered into this sixth day of April, 1867, between Allen P. Morris, of the parish of Morehouse, State of Louisiana, of the first part, and Henry Ware & Son, a commercial firm of the city of New Orleans, State of Louisiana, of the second part witnesseth: That whereas the said A. P. Morris has this day drawn a draft on the said H. Ware & Son dated this day and payable to his own order on the first day of January, 1863, for the sum of twenty-two hundred and thirty dollars, and as security for the payment thereof has given to said H. Ware & Son a deed of certain land, by act passed before E. G. Wells, notary public for the city and parish of New Orleans. Now, this private agreement is made between the parties hereto of the first part and second part, viz: The said parties of the second part are to accept the said draft of two thousand two hundred and thirty dollars and are also to discount the same or procure it to be discounted, for which they are to be allowed and are to receive a commission of five per cent. and interest at the rate of eight per cent. per annum, and are to place the net proceeds of said draft to the credit of said A. P. Morris on their books, subject to his order, and on the payment of said draft by said party of the first part, with interest after maturity at the rate of eight per cent. per annum, and the fulfillment of the obligations hereinafter entered into by the party of the first part, then the said parties of the second part are to reconvey to said A. P. Morris the land so sold by him to said parties of the second part,

23	665
44	936
23	665
51	1125
23	665
105	470
23	665
114	823
23	665
125	936

without further payment by him, the party of the first part, except the payment of drawing the necessary papers therefor and of the United States internal revenue stamps to be placed thereon; and the said party of the first part hereby binds and obligates himself to ship or cause to be shipped to said H. Ware & Son all the cotton raised during the current year on the two plantations in the parish of Morehouse known as the Rimes and Otterson places, which he is cultivating in connection with J. B. Nott and M. A. Bray, to be sold by said H. Ware & Son on commissions; and if the cotton so shipped during the current year does not amount to two hundred bales, then he is to allow to said H. Ware & Son commissions which, with the commissions on that which he does so ship, shall amount to a sum equal to what the commissions would be on two hundred bales of cotton, estimating four hundred and fifty pounds per bale and the price at the price at which middling cotton may be sold or quoted at in New Orleans on the first day of January, 1868, and the commissions to be two and one-half per cent. on that amount.

“In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

[L. s.]

“A. P. MORRIS,

[L. s.]

“H. WARE & SON,

“By H. WARE.”

Under the contract, as explained by the counter letter, the possession of the property continued in the defendant, Morris. The plaintiffs now bring this petitory action for the property and aver that they are the *bona fide* owners thereof by virtue of the said deed of the sixth day of April, 1867; they also claim the rent thereof from 1867, which is admitted to be worth one thousand dollars per annum.

The defendant pleaded the general denial and averred that no real contract of sale was executed by him to the plaintiffs; that the act purporting to be a deed of conveyance was not intended to divest him of the ownership of the property, but was executed merely as security for a certain draft drawn by the defendant for \$2230, which the plaintiffs were to accept and discount and place the proceeds to his credit, they being his commission merchants; that the parties did not consider said contract a sale, but simply as evidencing a hypothecary right to secure the advances to be made by the plaintiffs to enable him to carry on his plantation and raise a crop of cotton, which was to be shipped to them and sold on commission.

The court rejected the demand of the plaintiffs, and they have appealed.

Looking to the “private agreement” or counter letter to see the true purpose of the parties, we have no difficulty in determining that there was no sale of the property described in the petition. If effect

be given to the recitals and stipulations of that instrument, the idea of a sale is utterly precluded. If Morris was selling his land and mules and stock and plantation implements, as the deed purports, in order to raise \$2000 to buy plantation supplies, what was the use of drawing the draft maturing on the first day of January, 1868, to be accepted by H. Ware & Son at the expense of five per cent. commissions and to be discounted at a further expense and the proceeds placed to his credit? Why raise money on such exorbitant terms? Why incur these heavy charges and also bind himself to ship all his crops and guarantee H. Ware & Son in two and a half per cent. commissions to be derived from the proceeds of at least two hundred bales, whether he raised that number or not? Why pay three hundred dollars in commissions and discount, and also bind himself to give them commissions on \$20,000 worth of cotton, merely to get \$2000 in supplies, when that was already his, received as the price of the sale? Would a sensible or reasonable man sell property the rent of which is admitted to be worth \$1000 per annum for the paltry sum of \$2000, and then, in order to get the price, submit to discount and commissions amounting to \$800 in the aggregate?

What was the situation of Morris on the hypothesis of a sale? He was bound as drawer of the draft which he gave H. Ware & Son five per cent. commission to accept, and he had neither land, mules, horses, stock, farming implements—none of the property described in the act of sale of the sixth of April, 1867. Assuming there was a sale what effect can be given to that clause of the counter letter which declares, "that whereas the said A. P. Morris has this day drawn a draft on the said H. Ware & Son, dated this day and payable to his own order on the first day of January, 1868, for the sum of two thousand two hundred and thirty dollars, and as security for the payment thereof has given to said H. Ware & Son a deed," etc?

If the proceeds of the draft to be accepted and discounted were intended to be given to Morris as the price of his property, where was any debt to be secured?

If Morris continued to owe the debt which the counter letter says was intended to be secured, there was no sale. The seller gets the price and owes the buyer nothing for giving it to him. The property conveyed is deemed the equivalent for the price. Looking to the counter letter to learn the real purpose of the parties, we do not see their consent to make a sale; there was not the concurrence of the seller's will to sell and the buyer's to buy a particular thing for a particular price. There can be no contract of sale where it appears, as in the counter letter before us, that the intention of the parties was neither to buy nor to sell, but rather to disguise another contract under the false appearance of the contract of sale. Pothier on Sale, paragraphs 31, 38.

We had occasion to examine this subject very fully in the case of *Calderwood v. Calderwood*, lately decided, where there was disguised under the form of sale a contract of pledge or antichresis, which was discovered only in the counter letter.

Here a hypothecary right is given under the false appearance of a contract of sale, possession being retained by the ostensible vendor.

No doubt it is lawful to secure a debt under an apparent act of sale, but it is nevertheless a pledge or hypothecary right which really subsists between the parties, concealed, however, behind the false appearance of the contract of sale. In such a case the title never passes; the real contract may be a pledge or a mortgage—the apparent one a sale.

The reason a mortgage or pledge may be good under the form of a sale is, the latter combines all the rights of perfect ownership, and this necessarily embraces hypothecary rights of every description, and also possession. As every right appertaining to the thing is conveyed in the contract of sale, there is no reason why the conveyance of the hypothecary right embraced in that instrument should be lost, merely because it is made to appear that the owner did not intend to pass the other rights of property accompanying it in the act of sale. *Wolf v. Wolf*, 12 An. 529.

The real character and effect of a contract is determined from its constituent elements, and where it appears that the intention of the parties was not to sell nor to buy, as in the case before us, but merely to secure a time draft which the planter had given to his commission merchant to be discounted and the proceeds placed to his credit, by granting an hypothecary right upon his plantation, the contract amounts to a mortgage notwithstanding it is clothed in the form of a sale.

The character of the contract in this case is easily determined from the counter letter, where the real purpose of the parties is expressed. Between the parties the counter letter is as operative as if its recitals and stipulations had been expressed in the notarial act. We apprehend that if such had been done this suit would never have been instituted; the purpose and object of the contract would have been too apparent for doubt.

But the plaintiffs contend that the defendant is estopped from disputing their title to the property in controversy because, when subsequently becoming embarrassed and surrendering his property in bankruptcy, he did not surrender the property in dispute, and declared that he had disposed of it; that this amounts to a judicial admission that they are the owners thereof.

This is carrying the doctrine of estoppel too far, we apprehend. The moment the decree of bankruptcy is declared the bankrupt ceases to

have the right of disposition or to possess proprietary rights in the property belonging to him at that time. Even sales made by the bankrupt within four months of his bankruptcy are often avoided. Now if the plaintiffs were creditors of the defendant, with hypothecary rights upon the property in dispute, at the time he was declared a bankrupt, *no act of his could defeat his creditors in the bankrupt court. Even if he had designed it, he could not have conferred any greater rights upon the plaintiffs than they already possessed. It was not in his power to do so.*

If he was false to his oath, withholding the property in controversy from his bilan, and declaring he had disposed of it, it was the duty of the plaintiffs, as honest men, knowing its true situation, to step forward and disclose its true condition. They ought to have caused this valuable property, the rent of which is admitted to be worth \$1000 per annum, to be placed on the schedule of the bankrupt, and ask for the two thousand dollars due them out of its proceeds. This was due to the other creditors who knew not of the counter letter, and it was also due to the plaintiffs themselves as honest men.

We have seen that the contract of the sixth day of April, 1867, did not divest the defendant of the ownership of the property, although it gave the plaintiffs an hypothecary right thereon to secure the payment of the draft which they accepted for him. Will it require serious argument to prove that the *acts and declarations* of a bankrupt can not divest him or his creditors of the property which he owns at the time he files his schedule in bankruptcy? Surely not. If the surrender was the civil death of the bankrupt as to the property he owned at the time, fixing the status of his creditors in relation to his estate, surely no act of his thereafter could affect the succession or give creditors preferences or mortgage rights which they did not possess before it was opened. The rights of his creditors were as thoroughly fixed by *this civil death as if it had been the natural death of the defendant.*

We think the plaintiffs come with bad grace to claim, under their contract with the defendant, property yielding an annual revenue of one thousand for the paltry sum of two thousand dollars, or for merely indorsing his draft for that amount; and also that their title is not enhanced by the perjury and attempted fraud, if such there be, of the defendant while partaking of the advantages of the bankrupt act and seeking its relief from his embarrassments.

In *Collins v. Pellerin*, 5 An. 99, where certain cotton presses were sold by the defendant to the plaintiff for \$1500, and possession retained by the vendor, it was held not to be a sale, because the counter letter showed that the act of sale was executed merely to secure the loan of \$1500 made by Pellerin to Collins for twelve months from date, and on the default of the return of the money by the borrower within that period the sale was to be absolute and irrevokable.

In that case, involving the same principle, springing from a state of facts almost identical with the one before us, Chief Justice Eustis, as the organ of the court, remarked: "It is clear to us that the contract between the parties was not a sale with the power of redemption, but merely an hypothecary action. The sum of \$1500, we think the evidence shows, was far less than the value of the objects, and the circumstance of the vendor's remaining in possession we consider as a distinctive sign of the real nature of the contract. The want of delivery of the thing sold by the vendor is held by civilians to be a badge of simulation, and as depriving the contract of the essential characteristics of a sale. Redeemable sales, unaccompanied by delivery of the thing sold, of which the considerations are inadequate, courts are bound to consider, without sufficient evidence to the contrary, *as contracts for which the thing nominally sold stands as security and nothing else.*"

The contents of the counter letter we think authorize the conclusions of the district judge.

Judgment affirmed.

HOWELL, J., *concurring*. I concur with Mr. Justice Wyly that the act of sale and counter letter, construed together, do not constitute and were not intended by the parties to be an actual sale, but merely to secure the rights and interests of plaintiffs as the merchants and factors of defendant. The only difficulty in the case grows out of the defendant's admission on the trial that he did not place the property in controversy on his schedule in bankruptcy because he had disposed of it to the plaintiffs.

The record shows that he made his surrender after the institution of this suit, and it may be that he considered that under article 2453 R. C. C., which says "the thing claimed as the property of the claimant can not be alienated pending the action so as to prejudice his right," he was not authorized or justified in placing this property on his schedule, and that as the State court had jurisdiction of the question of its title, it should there be settled. Be this as it may, I can not say that, under all the circumstances, the admission in the evidence (and not in the pleadings) is such an estoppel as will conclude his right to make the defense set up in this case.

The admission, as contained in the record, is not necessarily an admission of a sale, and if a construction can be placed on it other than such as must convict him of fraud, such a construction should be adopted, as fraud is not presumed. The words "disposed of" may only have been used by him to mean such a disposition as shown in the pleadings herein, and to be settled in this suit.

The counter letter explains the disposition made of the property,

and we are not informed what report he made of it to the bankrupt court. What may be the effect, as to creditors, of his failure to place this property on his schedule, and what his duty was in making his surrender, are questions, in my opinion, not before this tribunal.

HOWE, J., *concurring*. It is sometimes said that a sale may be made to secure a debt. I think the expression inexact. A contract in the form of a sale may be so made, but it is not a sale. It is an hypothecation of some sort, defined or innominate.

I concur in the decree affirming the judgment of the lower court.

LUDELING, C. J., *dissenting*. The plaintiffs sue for a tract of land, and produce as the muniment of their title a notarial act of sale, perfect in form. The defendant denies that a real contract of sale was made, and that it was never intended to divest the title of defendant by said act of sale. And my learned brothers assuming this to be true, hold that there was no sale for the want of consent. I say with due respect that they assume that the parties did not intend a sale, for, in my judgment, the record flatly contradicts the statement. In the notarial act of sale it is recited "that for and on the terms and conditions hereinafter set forth and expressed, he (A. P. Morris) does by these presents grant, bargain, sell, convey and assign, set over and deliver, with full warrantee, * * * unto H. Ware & Son * * * the following described property," etc. The deed further recites that "said vendor declares that he is married, and that his wife is absent from the city of New Orleans; nevertheless he hereby binds and obligates himself to furnish the formal and legal renunciation of all her rights of dower in and to the herein conveyed property, within thirty days from the execution of these presents," etc. The act of renunciation was in due time passed, in which she renounced all rights to the property "conveyed."

In the counter letter it is recited that "as security for the payment of a draft for \$2000," he "has given to said Ware & Son a deed of certain land by act passed before E. G. Wells, notary public for the city of New Orleans. Now, this private agreement is made between the parties of the first and second part, viz: The said parties of the second part are to accept the said draft of \$2030, and are also to discount the same or procure it to be discounted, for which they are to be allowed and are allowed to receive a commission of five per centum and interest at the rate of eight per centum, and are to place the net proceeds of said draft to the credit of said Morris, on their books subject to his order, and on the payment of said draft by said party of the first part, with interest after maturity at the rate of eight per cent.

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per annum, and the fulfillment of the obligations hereinafter entered into by the party of the first part, then the parties of the second part are to reconvey to the said A. P. Morris the land so sold by him to said parties of the second part, without further payment by the party of the first part, except the payment of the expenses of drawing the necessary papers," etc.

This language, to me, is as unambiguous as it is possible to make it. A. P. Morris sells the land for the price stipulated; it is immaterial whether that was the \$2000 stipulated in the notarial act, or only the net proceeds of the draft accepted by Ware & Son and discounted, as stipulated in the counter letter, and the said vendor reserved to himself the right to redeem the property on the terms stipulated in the counter letter. Whether these obligations assumed by the vendor in the counter letter should be discharged or not, depended upon the choice of the vendor. They depended upon a potestative condition only, and Ware & Son could not have enforced them against the will of A. P. Morris. This was the contract made by the parties; it was the law unto themselves, and this court has not the right, though it has the power, to make a new contract for them. C. C. 1945. But if there be any ambiguity in the contract, construing the public and private acts together, the deed must be construed against the defendant, because it is only as a sale that the contract of the parties can have any legal effect.

"When a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect, rather than in a sense which would render it nugatory." C. C. 1951.

If it was not a sale it afforded no security to Ware & Son for the acceptance or advance of \$2000.

It is not a mortgage, very surely, which is "a right granted to a creditor over property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment. C. C. 3278, 3279, 3280. It is equally certain that it is not an antichresis, which is a pledge of real property. C. C. 3133, 3134, 3135.

The defendant's counsel call it an hypothecary right. I know of no such right except it flows from a mortgage, or, perhaps, the antichresis. But article 1956 of the Civil Code informs us that "when the intent of the parties is doubtful, the construction put upon it by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."

The record shows that the defendant did not pay the draft, nor did he ship his cotton as stipulated in the counter letter. But that he went into bankruptcy, and in that proceeding he admitted judicially and under oath that he did not own the property in question by not placing this property on the schedule of his property surrendered, and

during the progress of the trial of the present suit he admitted that he had not surrendered this property in bankruptcy, "because he had previously disposed of it to the plaintiffs." Can there be a doubt after this that it was the intention of the vendor to sell and of the purchaser to buy the property? To do so we must suppose that the defendant perjured himself, when he gave in under oath a list of his property to the register in bankruptcy, and that he falsified the truth when he admitted that he had previously disposed of the property to the plaintiffs. It is the part of charity to believe his statements were true, and especially when the acts in question themselves corroborate his statements.

It is asked, why did Morris draw his draft for \$2030, and agree to pay five per cent. per annum interest thereon, if the contract were a sale? The answer is obvious. Because he reserved the right to himself to redeem the property, and in that event he was to pay the draft with interest and commissions and perform the other obligations assumed in the counter letter. Because the bargain was a hard one for defendants, is no reason for us, in this suit, to abrogate it. There is no question of lesion or usury in this case, nor is there any question of the sanity of the defendant. The question is simply do the two acts already referred to constitute a sale or not? I have no doubt of it, and I know of no law which would authorize this court to annul it except for lesion, if that were proved, and proper pleadings and parties had been made for that purpose. "Judges should be astute in furtherance of right, and the means of recovering it." If the plaintiffs can not recover in this suit, I know of no means by which they can secure their debt. I therefore dissent.

TALIAFERRO, J. I concur in the dissenting opinion delivered by the Chief Justice in this case.

No. 212.—JOHN T. LUDELING v. S. BOOZMAN and J. B. FLUKER,
Administrator.

An acknowledgment of a promissory note may be proved by parol testimony so as to interrupt the current of prescription.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. D. C. Morgan*, for plaintiff and appellee. *Todd & Brigham*, for defendants and appellants.

HOWE, J. This is an action on a promissory note, and the defendants, who have appealed, make but one point here—the prescription of five years. The note matured in 1859, and citation was served in this case in 1867.

The plaintiff testified that the defendant Boozman acknowledged the debt in 1862, again in 1864, and again in 1866, and these statements are

Ludeling v. Boozman and Fluker, Administrator.

fortified by a reference to events which would be likely to fix the dates approximately in the memory of the witness.

The defendants attempt to criticise the accuracy of these dates; but it is only necessary to remark that even if the events did not occur at the exact times mentioned by plaintiff, but at the times fixed by defendants, yet acknowledgments made at the times fixed by defendants would constitute a chain of interruptions which would have prevented prescription from being acquired.

One of the defendants attempts to contradict the testimony of the plaintiff on the question of acknowledgment, but his attempt does not appear to be very successful. We may add that he set up in the court below the defense of want of consideration of the note, attempted to prove it by his own testimony, and then abandoned it. He also filed a purely frivolous exception, which is also abandoned. It can not be expected that such tactics will inspire the court with much respect for the sincerity and good faith of a litigant; but, on the contrary, they must operate against him in case of a conflict of testimony. On the whole, we do not think the judge *a quo* erred in his estimate of the weight of proof.

Judgment affirmed.

Ludeling, C. J., recused.

No. 201.—G. S. MAYO et als. v. L. G. DUKE, Curator.

The duty imposed on curators of vacant estates by article 1134 R. C. C., of making publication in two newspapers in the city of New Orleans of the death, the name, surname, place of birth and death of the deceased, whose succession he administers, does not apply to or affect the right of the heirs to be recognized as such. If, therefore, this duty is omitted or neglected by the curator, the heirs may still be recognized by complying with the requirements of the law in such cases.

A PPEAL from the Parish Court of Catahoula. *H. B. Taliaferro*, Parish Judge. *Richardson & Boatner*, for plaintiffs and appellants. *J. F. Hughes*, for curator.

HOWELL, J. The plaintiffs ask to be recognized as the heirs of William Burns, deceased, and that the defendant as curator be ordered to render an account of his curatorship and pay to them such sums as may be due to them as heirs. The answer is a general denial and a special denial that plaintiffs are in any way entitled to the property of William Burns, deceased.

The judge *a quo* refused to recognize them as heirs on the ground that the curator had not complied with the requirements of article 1134 R. C. C., which directs curators within a certain time to make publication in two newspapers in New Orleans of the death, the name, surname, place of birth and death, etc., of the deceased whose succession he administers, if the heirs do not appear in person or by attorney.

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We think the learned judge made a misapplication of this provision of law. It certainly imposes a duty on the curator, but the observance or non-observance of it is not intended to affect the right of heirs to apply to be recognized as such. This they have a right to do at any time upon certain conditions and formalities required of themselves and not of the curator. R. C. C. 1192-1194; C. P. 997-1005.

In this case the evidence is satisfactory that the plaintiffs are the only heirs of the deceased, William Burns, whose succession is administered by the defendant, and under article 1193 R. C. C., and article 1003 C. P., they must, under the allegations of their petition, be recognized as such, and the curator ordered to render an account to them and pay.

It is therefore ordered that the judgment appealed from be reversed, and that the plaintiffs be recognized as the heirs of William Burns, deceased, and the defendant ordered to render to them, within thirty days from the date of filing this decree in the lower court, a faithful and exact account of his administration and pay over to them the amount due them according to law.

Mr. Justice Taliaferro took no part in this decision.

No. 232.—HODGE RABUN v. L. CAGE, Administrator.

Evidence tending to show that the plaintiff admitted that the defendant or his agent had settled or liquidated the indebtedness, or the greater portion thereof, is admissible under the general issue.

If evidence has been offered and received on a former trial, the plaintiff can not urge that he is taken by surprise if it be offered again. Nor can the defendant urge such objection in case the plaintiff has offered evidence which has been received on the former trial. The rule applies with equal force to both plaintiff and defendant.

APPEAL from the Eleventh Judicial District Court, parish of Jackson. *J. F. Pierson*, attorney at law, Judge *ad hoc*. *J. & J. W. Young*, for plaintiff and appellee. *J. E. Hamlette, John Ray and Kidd & Smith*, for defendant and appellant.

This case was tried by a jury in the court below.

LUDELING, C. J. This case was before us in 1869, and we then remanded it because we thought the evidence in support of the claim against an estate unsatisfactory, when taken in connection with the evidence of the defendant, tending to show that plaintiff had admitted that the balance due him was about \$1500.

On the second trial the defendant offered J. Y. Allen to prove that shortly before the death of Cage, plaintiff, who had come to see Cage to have a settlement, said that Cage had had ninety-eight bales of cotton belonging to plaintiff; that Cage had sold it for about \$10,000, and that *that* would make "them very near even, possibly

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lacking \$1000." And defendant also offered C. W. Allen to prove that soon after the death of Cage, Rabun, when speaking of the situation of the pecuniary relations existing between himself and Cage, stated deceased and he were about even. This testimony was objected to on the ground "that it was irrelevant, illegal and for the purpose of establishing a fact not alleged in the pleadings, and also for the purpose of impeaching the testimony of Hodge Rabun without having laid a basis therefor." The objection was sustained on the ground that "the evidence tended to prove extinguishment [of the obligations] without pleading it," and the defendant took a bill of exceptions.

The answer was a general denial and a plea in reconvention.

The suit is for an account on the part of Cage as agent for Rabun, and for money loaned him. The testimony tended to show that plaintiff had admitted that the agent had accounted for or liquidated the claims for money received for the cotton and loans, except a comparatively small portion thereof, and it should have been received. Evidence of the same declarations had been received on the former trial, and therefore the plaintiff could not pretend to be taken by surprise.

The evidence offered by the plaintiff to prove that Cage had sold cotton belonging to plaintiff, and that he had not accounted for it, was objected to on the ground that the allegations of the petition did not justify the proof that they sued for the price of the cotton sold to Cage, and not for an account.

The rule is elementary that the proof must correspond to the allegations. And it can not be denied that the pleadings in this case are inartistic. But one of the most valuable features of our system of jurisprudence is the simplicity with which parties are permitted to bring their rights before the tribunals of justice. The technicalities which in other countries embarrass and obstruct the progress of justice are unknown to it. All it requires is that each party shall so state his grounds of attack or defense that the adversary shall not be taken unawares, and that the judgment which may be rendered will enable him, for or against whom it has been given, to protect himself by the plea *res judicata*. These are the only objects to be obtained by pleading.

It is manifest that the defendant could not have been surprised by the evidence which had been received on a former trial, and it is evident a judgment in the case would be a bar to any other action for an account for the proceeds of the cotton. 5 An. 531; Frierson v. Erwin, 10 An. 528; 12 An. 795, Lowry v. McCoy.

As we can not weigh the evidence of J. Y. Allen and C. W. Allen, which is not before us, we are constrained to remand this case again.

It is therefore ordered that this case be remanded to the lower court to be tried anew, in conformity to the views herein expressed, and that the plaintiff and appellee pay costs of this appeal.

No. 262.—STATE OF LOUISIANA v. MARTIN TALLY.

The jury, in a verdict of manslaughter, have nothing to do with fixing the punishment. Evidence which goes only to the mitigation of punishment, and is conceded not to constitute any legal excuse, is therefore irrelevant and not admissible.

The jury are the judges of the law and the facts, but when sitting on the trial of a criminal cause, they should take the law as given them by the judge. The jury may, however, disregard the construction of the law as given by the judge.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Lerisee, J. James S. Ashton*, district attorney, for the State. *James W. Duncan, J. C. Moncure and A. W. O. Hicks*, for defendant and appellant.

HOWE, J. The defendant was indicted for murder, found guilty of manslaughter and sentenced accordingly, and has appealed.

We will examine the points in the order in which they are presented in the appellant's brief. He contends:

First—That the judge *a quo* erred in not permitting the defendant to prove how the killing of F. W. Tally, the father of the defendant, by O'Neal, whom the defendant killed, occurred, the State having admitted that O'Neal had killed said F. W. Tally.

The judge excluded the testimony on the ground that the killing of defendant's father by O'Neal in August, 1870, could turn sh no legal excuse for the killing of O'Neal by defendant in April, 1871. We do not think the judge erred; and, indeed, we do not understand the defendant as claiming here that the facts offered to be shown, if shown, could do anything more than go to the alleviation of punishment. But the jury in this case have found a verdict of manslaughter, and for the practical purposes of this case we must look at the offer of proof from the point of view of this verdict. Now, in manslaughter the jury have nothing to do with fixing the time of imprisonment, and therefore any evidence which goes to a mitigation of punishment only, and is conceded to constitute no legal excuse, is irrelevant before the jury.

Second—That the court erred "in excluding the dying declarations of F. W. Tally, the father of defendant, offered for the purpose of showing the influences under which the defendant acted in killing O'Neal, and as producing in his mind the belief that his father was murdered by O'Neal."

The judge excluded the testimony for the reason that it had already been shown that F. W. Tally was killed by O'Neal on the sixteenth August, 1870, and the killing in this case took place on the eighth day of April, 1871, and the suggestions of the dying man to his son could not, under such circumstances, constitute any excuse after so long a delay, if at all.

The answer we have given to the first point is an answer to this, and we do not think the judge erred.

Third—That the judge erred, while discussing with counsel the ad-

missibility of the testimony thus offered, "in characterizing the killing of O'Neal as a murder." The judge in the bill of exceptions says in reference to this point: "The court referred necessarily to the specific facts by way of stating its reasons in ruling a question of evidence raised by defendant, and they were necessary." We take this statement of the judge as true, and with his explanation we fail to perceive any error. The conclusion from the whole bill is, that the judge declared that the fact that O'Neal was a murderer would not justify his murder, a proposition of law, the enunciation of which could afford the appellant no ground of complaint.

Fourth—That the judge erred in his charge to the jury in reference to their being judges of both law and facts. We may here remark that we can not notice the affidavits which appear annexed to the record relating to the disputed question as to what the judge charged on this point. Nor can we pass upon the bill of exceptions found at page five of the record, which refers to a paper which appears to be lost, and without which the bill is incomprehensible. Nor can we notice the request to charge on this subject at page nineteen, which was refused, as the appellant took no exception to such refusal. We find, however, at page twenty, that the judge charged the jury "that they were judges of the law and fact, but they are expected to receive the law as given them by the judge."

We see no error in the charge above quoted. The jury are judges of the law and fact, but the judge is required to give them a knowledge of the law applicable to the case. R. S. § 991. It would be a vain thing for him to give them this knowledge if they were not to receive it. On the contrary, they are expected, and ought, as a rule, to receive it, though they are under no compulsion to do so. *State v. Ballerio*, 11 An. 81; *State v. Scott*, 11 An. 429; *State v. Scott*, 12 An. 386; 17 An. 71.

Fifth—"That the court erred in permitting the jury, in their retirement to consider of their verdict, to have in their room Wharton's Criminal Law to consult in relation to their verdict."

The facts implied in this proposition are not certified to us in such a way that we can apply the law to them. The judge refused to sign a bill of exceptions in which they were recited, and the only bill in which they are alluded to is one taken to such refusal. The appellant, who has taken no steps to compel the judge to certify the facts in the proper form, can not complain. But we deem it not improper to remark that we see no force in the point, if it be presented.

Sixth—"That the court erred in refusing to grant a new trial after it was discovered that the written charge of the court, prepared at the request of defendant's counsel, had been lost, as well as the charge given at the request of the district attorney and excepted to."

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We do not find any such reason given in the motion for a new trial in the record, nor anything to show that the document was lost at the time the motion was heard, or that the matter was ever brought in any way to the attention of the district judge as a reason for a new trial or in any other view. We can not say, therefore, that he erred, for this reason, in refusing the motion for a new trial.

Judgment affirmed.

Rehearing refused.

No. 122.—A. B. HUGHES, Administrator, v. R. B. PATTERSON et al.

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The fact that suit has been brought for a tract or body of land and afterward dismissed by the plaintiff, is not such a disturbance as will give the vendee the right to demand security against eviction before payment.

If several persons have purchased a tract of land and given their obligation for the price *in solido*, with a single mortgage on the entire tract as security therefor, the vendor or the holder of the obligation may pursue either one of the obligors for the whole amount, but if he desires to sell the property mortgaged in payment of the obligation, then he must make all the obligors parties to the suit, otherwise no title of the interest in the land of such obligors as are not made parties would pass to the purchaser.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levissee, J. T. T. & A. D. Land*, for plaintiff and appellee. *Looney, Wells & Duncan*, for defendants and appellants.

TALIAFERRO, J. The defendant Patterson and John Walpole, Sr., in January, 1862, bought at a succession sale of property belonging to the estate of William Arick a tract of land, which was adjudicated to them at the sum and price of \$4939 80. The adjudication was "to Robert B. Patterson and John Walpole, Sr., of the parish of Caddo," etc. They executed *in solido* two promissory notes, each for one-half the price, payable respectively in one and two years from the twenty-fifth of January, 1862, stipulating interest at the rate of eight per cent. per annum from date. Baer and W. M. Walpole signed the notes with them as their sureties. The purchasers specially mortgaged the land purchased to secure the payment of the notes.

This suit is brought by the administrator of Arick's estate to enforce payment of these notes. The defense is placed upon three grounds:

First—That defendants should be released from the payment of all interest on the notes sued on.

Second—That before payment of the notes the defendants should be protected against the claims of the United States government, and those of the heirs of Wilkins Dales against the land purchased by defendants.

Third—That the mortgage should be enforced only against the interest of the parties before the court in the land mortgaged.

The court *a qua* rendered a judgment *in solido* against Patterson and Baer for the principal of the notes, with eight per cent. interest from

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judicial demand, and ordered that the plaintiff's mortgage be enforced on Patterson's undivided half of the mortgaged land. From the judgment so rendered the plaintiff has appealed.

This suit is against all the makers of the notes. After answers filed, John Walpole, Sr., and William M. Walpole died. It does not appear that the suit was revived against the heirs or representatives of the deceased parties.

The defendants have not succeeded in establishing disturbance in the possession of nor danger of eviction from the land purchased. In support of this plea they introduced in evidence the record of a suit of Dales v. Baer and Walpole, on the docket of the district court for the parish of Caddo, in which Dales set up a claim to the land. The suit consists of a petition filed in April, 1862. There seems to have been no citation nor appearance of the defendants. In April, 1863, the suit was dismissed on motion of plaintiff's counsel. The defendant Patterson in his testimony says that possession was refused by Dales, who pretended that he owned the land; but he admits that he did not know who was in actual possession of the land or whether any person was, and that he never went to take possession of it at the time of the sale or afterwards. He says that he offered to pay the administrator if he would make the titles good or give security, but that both the administrator and the auctioneer refused to receive payment until the suit instituted by Dales was disposed of. This declaration that he was prepared to pay does not amount to a legal tender. C. P. art. 407; 2 An. 442; 6 La. 19.

We concur in opinion with the judge *a quo* that the defendants failed to establish a right to claim security against eviction as a condition precedent to making payment. There was no disturbance. Where, in such cases, suit is brought and afterwards dismissed, the vendee has no ground for refusing payment. 4 N. S. 352; 3 L. R. 432; 16 La. 501.

This view of the second ground of defense disposes of the first. The third point of the defendants remains to be considered.

The plaintiff maintains that a judgment against either of the joint owners, being solidary obligors, authorizes an order of sale against the whole property. The defendants, Patterson and Baer, contend that the mortgage can be enforced only against the interest in the land of the party before the court. The position of the plaintiff is correct that in the case before the court there is but one obligation to pay the price—a single debt secured by special mortgage; that this obligation can not be divided or paid in part without the consent of the obligee; that each of the debtors *in solido* can be compelled to pay the whole debt; that the obligors may be pursued separately or all together; that the mortgage is in its nature indivisible, and extends over all the immovables subject to it; that it is *tota in toto, et tota in qualibet parte*.

But does it follow that because the plaintiff may demand the whole amount of his debt from any one of his debtors *in solido*, and each and every portion of the mortgaged property is affected for each and every portion of the debt, that the title and right to the undivided half interest owned and held by one of the solidary obligors and mortgageors can be divested judicially without making that joint owner, or his representatives, a party to the proceeding and decree by which the whole of the mortgaged property is ordered to be sold to satisfy the debt? The plaintiff refers to the case of *Walton v. Lizardi*, 15 L. R. 588; to that of *Erwin v. Green*, 5 Rob. 70, and to that of *Gordon v. His Creditors*, ib. 47. But we think neither of these cases presents the point raised in the case now before us.

The first of these cases merely determines the nature of the title acquired by Walton & Kemp from Lizardi and the extent of his liability under their contract of sale. The second, varying in its facts from the first, decides the nature and extent of the obligation contracted by some of the plaintiff's vendees, who, as mortgageors, were, upon the supposition that their interest in the land sold was mortgaged with that of the other vendees, made parties to the suit and remained such until its final result. The third case was, where the whole tract of land being mortgaged, the undivided half interest of one of the mortgageors was, without objection, sold by his syndic, and thereupon a contest arose among the mortgage creditors over the proceeds.

In the case at bar the extent of the plaintiff's right against all the solidary obligors and the indivisibility of the mortgage in his favor to secure the payment of his debt can not be contested. But what remedy does the law confer upon him to enforce his right? His debtors may be sued separately or altogether, and the whole debt may be demanded from any one of them. He may, moreover, cause the whole of the mortgaged property to be sold to satisfy his claim and he is not, under his contract of sale, obliged to submit to a sale of a fractional part of, or interest in, the hypothecated premises by which his security might be diminished or impaired. The mortgage, on the other hand, does not divest the owner of the property itself, but only of the right on the property, the title to which, as well as the possession, remains in this case in John Walpole, Sr., or his representatives. 2 La. 158. And as no one, however holding the title to property can, under our system of laws, be divested judicially of that property unless by due process of law, in which he, as owner, is made a party before the court, any judgment, unless rendered contradictorily with him, the effect of which would be to expose his property for sale, would not divest him of title or transfer to a purchaser his right to the property. The representatives of John Walpole, Sr., one of the joint owners of the whole tract of land sought by the plaintiff to be sold to

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satisfy the judgment *in solido* against Patterson only, were necessary parties, whose participation in the suit was essential before any judgment affecting their interest in the land could be made obligatory upon them or could form a valid basis of a judicial sale of their interest in the property. To determine otherwise would be to ignore the fact that John Walpole, Sr., and his representatives, since his death, had and continue to have and hold a vested title and interest in the land in question which could only be divested according to law.

The judgment appealed from, so far as it condemns Patterson and Baer *in solido*, is a proper one; but so far as it decrees the sale of Patterson's half interest only, it can not be maintained, and the case must be remanded for the purpose of making proper parties.

It is therefore ordered, adjudged and decreed that the judgment of the district court, so far as it orders a sale alone of the defendant Patterson's half share and interest in the mortgaged property, be annulled, avoided and reversed, and in other respects that the judgment be affirmed.

It is further ordered that this case be remanded to the court of the first instance in order that proper parties be made, and then to be proceeded with according to law, the defendants and appellees paying costs of this appeal.

No. 190.—Tutorship of ISABELLA P. HEWITT—Opposition to Tutor's Account.

Prescription does not run against the tutor on a claim which he has against his ward for board and lodging during the tutorship, nor are such items prescribed until the lapse of four years after the tutorship has terminated, that being the period of time allowed by law to the minor after emancipation within which the tutor may be called upon for an account. In like manner, the charges of the minor for services rendered the tutor during the time of the tutorship are not prescribed until four years have elapsed after the tutorship has terminated.

A PPEAL from the Parish Court of the parish of Morehouse. *James Bussey*, Parish Judge. *S. G. Parsons*, for tutor, appellant. *Todd & Brigham*, for opponent and appellee.

WYLY, J. Isabella P. Hewitt, wife of William D. Seal, opposes the homologation of the final account of her tutor, Benjamin Murrell, alleging that the items thereof are incorrect, and pleading the prescriptions of one, three, five and ten years in bar thereof. She also sets up that the charge for her board, lodging and clothing claimed by her tutor is unjust and excessive, and avers that her labor and services during the period she was supported by him were worth more than the value thereof. She also opposes the credit of \$420 allowed as her share of the proceeds of the land sold on the application of said tutor,

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on the ground that the sale thereof, without her consent, was illegal, the order of sale and the sale under the tutorship having been effected after her emancipation by marriage and the termination of the tutorship. She also avers that suit has been instituted and is pending for the recovery of said land.

The court, sustaining the plea of prescription, gave judgment for the opponent, rejecting the items debited in the account and reserving the rights of both parties in reference to the land sold under the tutorship, and the rights of the opponent, suggested in her supplemental petition, in regard to the succession of her grandmother, Mrs. Murrell.

From this judgment the tutor has appealed.

The correctness of the items charged is not disputed, except the claim set up by the tutor for board, lodging and clothing of the opponent during minority, a period of nearly twelve years. This is averred to be unjust and excessive, because her services and work for the tutor during that period are claimed to be adequate remuneration therefor.

In bar of each item of the account, however, the prescriptions of one, three, five and ten years are opposed. This account was rendered within four years after the termination of the tutorship by the emancipation by marriage of the minor.

Undoubtedly the opponent had the right to call for an account of the tutorship at the time this account was voluntarily offered; and if the claims of the minor against the tutor are not prescribed, we do not see why the claims of the tutor against her should be prescribed. It is a fair and lawful adjustment of accounts between the minor and his tutor that the law contemplates may be demanded by the minor within four years after arriving at the age of majority. It is not for the purpose of ascertaining and enforcing the claims of the minor against his tutor and rejecting the claims of the tutor against the minor on account of prescription. In the settlement of account between these parties we think the prescriptions urged are inapplicable. The tutor is a legal mandatory and he may claim any credit arising in his behalf in the performance of that duty at any time he may be liable to be called to account to the court which appointed him.

That he is to be required to institute proceedings or to cause to be issued citation to arrest prescription during the tutorship, is unreasonable, and it is equally unreasonable that he should do so during the period of four years after majority, within which time the law expressly gives the minor the right to call for an account. Within four years the tutor can be held to account for his performance of duty during the tutorship, and that duty was as much to protect and sup-

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port the minor as to pay the debts of the tutorship and to preserve and account for the property. We think the account for board, lodging and clothing, as well as the account for moneys advanced in behalf of the tutorship, is not prescribed. 12 R. 155; 4 An. 368.

It remains for us to ascertain the value of the board, lodging and clothing claimed by the tutor for the period of nearly twelve years. On this point the evidence is conflicting. Some of the witnesses regard the services of the minor during this period to be worth more than her board, lodging and clothing; they mainly agree that the value of this account is \$200 per annum, exclusive of the services rendered by the minor. When the tutorship was opened the minor was only seven or eight years old. The tutor was her grandfather, who had servants about the house, and it is shown that the minor was supported and dressed in about as good style as other children of the neighborhood; and that she did render valuable assistance in the family of the tutor, where she lived. We think during the first five years she was not able and did not render valuable services, owing to her extreme youth; after that and till the end of the tutorship her services were worth the value of her board, lodging and clothing. This we believe, from the evidence, to be an equitable adjustment of this item charged in the account. The claim, therefore, for board, lodging and clothing should be reduced to \$1000, being \$200 per annum for five years.

The other items for cash advanced for the benefit of the tutorship seem to be correct.

It is conceded that the tutor has had no funds of the tutorship, the property thereof being only a small tract of unproductive land. As the opponent repudiates the sale thereof and has instituted proceedings to annul it, we think the credit of \$420 was properly disallowed and that the court did not err in reserving the rights of both parties in relation to it; also that the court did not err in reserving the rights of the opponent in the community property of her grandmother, Mrs. Murrell, which does not properly appertain to the settlement of this tutorship.

It is therefore ordered that the item for board, lodging and clothing of the minor be reduced to \$1000 and allowed; that all the other items of the account, except the credit of \$420, be allowed; and as thus amended that the account herein be approved and homologated, and the items thereof be the judgment of the court, reserving, however, the rights of both parties in relation to the land which the tutor claims to have sold; and also reserving the rights of the opponent to the community property of Mrs. Murrell.

It is further ordered that appellee pay costs of appeal.

Rehearing refused.

No. 184.—D. H. WILLIAMS v. DOUGLAS, Sheriff, et al.

In executory proceedings to enforce the sale of mortgage property belonging to an absentee, service of notice of the order of seizure and sale upon the attorney appointed by the court to represent the absentee is sufficient to interrupt the current of prescription.

If a mortgage debtor invokes the conservatory remedy of injunction to stay the sale of the property mortgaged, without showing any valid or legal excuse therefor, he will be condemned to pay to the seizing creditor the damages which the law has provided in such cases.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. D. C. Morgan*, for plaintiff and appellant. *Morrison & Farmer*, for defendants and appellees.

TALIAFERRO, J. This case was before this court at the July term, 1869. The judgment of the District Court was reversed and the case remanded for further proceedings in due course of law. See 21 An., p. 468. Subsequently, from the destruction by fire of the court house in which were the public offices of the parish of Morehouse, the original papers of the suit were lost, but the transcript of appeal being preserved, it was substituted for the original record and the case was proceeded with and finally determined in May, 1871. Judgment was rendered in favor of the defendants, dissolving the injunction and allowing them \$200 as damages for attorney's fees.

The plaintiff has appealed. Defendants pray that the judgment be amended by awarding them twenty per cent. damages, ten per cent. interest, etc.

Warren, Gilmore & Co., being the owners and holders of a promissory note for the sum of \$1700, drawn by the plaintiff, D. H. Williams, to his own order, and secured by mortgage on lands lying in the parish of Morehouse, proceeded *via executiva* against the mortgaged property to enforce payment of the note which bears date sixth March, 1861, and due twelve months after date. Williams being an absentee, the appointment of an attorney to represent him was prayed for. An order of seizure as prayed for was rendered by the district judge on the twenty-first of April, 1866. The order appointing the attorney to represent the defendant was rendered by the clerk of the district court and dated, as appears upon the transcript of appeal, May twenty-sixth, 1868.

The defense is prescription. The plaintiff contends that the note was extinguished on the sixth of March, 1867, and that this fact is apparent on the face of the papers, more than a year afterwards having elapsed before an attorney was appointed to represent the absent defendant. The plaintiff proceeds further to make the following points:

That if the appointment was made in time, it was nevertheless illegal and null, because the power or right to make appointments of

attorneys to represent absentees in cases of executory process vests solely in the district judge, and relies upon article 737 of the Code of Practice.

That, if under the provisions of the act of 1857, extending the powers of clerks of courts, that of appointing attorneys to represent absentees in cases of executory process were granted to them, the power so granted was only conditional, depending upon whether the district judge was present or not in the parish at the time the process was asked for.

That, in the only case in which a clerk could appoint, that of the absence of the judge, such absence should have been shown to the clerk by the affidavit of the party or his attorney, and that in this case no such proof was made.

That, conceding the legality of the proceedings taken in regard to the appointment of the attorney, and that he had been legally served with the proper notice, and that these steps had all been taken previous to sixth March, 1867, when the obligation became extinct by prescription, still no legal citation necessary to interrupt prescription was made, because interruption could only take place by service of the *ex parte* order of seizure and sale made upon the debtor personally.

The position taken by the plaintiff that the appointment of the attorney to represent him was not made until after prescription had accrued, is not tenable. We are satisfied, from comparing the dates of the several acts making up the executory proceedings had in the case, that the date appearing in the record to the order appointing an attorney was, through a clerical error, erroneously written May 25, 1868, instead of May 26, 1866. The order of seizure is dated twenty-first of April, 1866. The notice of the order bears date twenty-sixth of May, 1866, and service of the notice appears in these words: "Received in office on the twentieth day of May, 1866, and on the thirtieth day of May, 1866, I made service by handing J. Harvey Brigham, attorney, a copy of this notice of judgment in the town of Bastrop, Louisiana. J. L. Pratt, sheriff."

Here, then, it is clear the dates of these papers were originally in their natural order. The judgment or order of seizure bearing date twenty-first of April, 1866. The filing of the petition and order on the same, on the twenty-sixth of May, 1866. The appointment of the attorney on the twenty-sixth of May, 1866. The notice of the order on the same day, the receipt of the order and notice by the sheriff also on the same day, and the service of them on the thirtieth of May, 1866.

In regard to the next point of the plaintiff in injunction that the clerk was without authority to appoint an attorney for the absentee,

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we think there is no question that by the act of thirteenth March, 1857, he was clothed with that power when the judge of the district was absent. Coming to the next ground taken by the plaintiff, that if authorized in the absence of the judge to issue the order, such absence should be shown by affidavit, we remark that no affidavit showing the absence of the judge is required by the act. It is shown beyond cavil that the order appointing an attorney to represent the absentee was made by the clerk. The maxim *omnia praesumuntur rite esse acta* applies, and against the presumption that the order was rendered in the absence of the judge, it was for the plaintiff to show that it was not

The last point made by the plaintiff is, that notice of the issuing of an order of seizure and sale served upon the attorney appointed to represent an absentee is insufficient to interrupt prescription, is a doctrine we are not willing to assent to. Executory process would otherwise, as against absentees, be nugatory. It would be conceding greater rights to persons residing without our State limits than to those living within them. While our laws deal fairly and justly with absentees by appointing persons to represent them, and to defend them in all matters affecting their rights in this State, still, that representation is intended as well to afford facilities to our own citizens to prosecute their claims against absentees. If citation and notice made upon the representative of an absentee would not suffice to interrupt prescription running in favor of the absentee, we do not readily see how it could be effected. We can not see that such a rule could be sanctioned by the broad principles of reason and equity.

We are of opinion that the equitable remedy of injunction has in this case been abused. The plaintiff has found means to procrastinate the payment of a just debt to an undue extent, and seeks now through a tissue of technicalities to evade its payment entirely. We think he has thereby incurred the penalties justly prescribed for that character of litigation.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be amended, so that in addition to the sum of \$200 awarded to the defendants in injunction, Warren & Crawford, as special damages, it is now ordered and decreed that they recover from the plaintiff in injunction and his sureties on his injunction bond *in solido*, viz: David H. Williams, S. G. Parsons, R. B. Todd and J. Harvey Brigham, as general damages, the further sum of twenty per cent. of the amount adjudged against the said Daniel H. Williams by the original order of seizure and sale rendered on the twenty-first of April, 1866. It is further ordered that the said judgment of the District Court, rendered on the twenty-third of May, 1871, as thus amended, be affirmed with costs.

Markham v. O'Connor, Sheriff, et als.

No. 268.—S. A. MARKHAM v. J. J. O'CONNOR, Sheriff, et als.

A judgment creditor who has caused a seizure of real estate, the ownership and possession of which is shown to be in a third party, can not be permitted to attack his title thereto in an injunction taken out by the owner to stay the sale, unless he allege that the title is simulated. The allegation of fraud, if made, would not authorize the attack of the title in this form of action.

If a creditor has intervened and made himself a party to the suit of the wife against her husband, he can not afterward and in another form of action attack the judgment rendered in favor of the wife.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Lerisee, J. R. J. Looney*, for plaintiff and appellee. *Land & Taylor*, for defendants and appellants.

WYLY, J. The plaintiff, claiming the ownership and possession since 1861 of a certain lot of ground and improvements in the city of Shreveport, and claiming a prior mortgage on a certain other lot in said city, sued out an injunction restraining the sale of the one, and prayed that the proceeds of the sale of the other be paid over to her by virtue of the superiority of her mortgage thereon, the sheriff having seized said lots under an execution issued in the case of I. W. Arthur & Co. v. Martin Tally, on the docket of the district court, parish of Caddo. To this demand the defendants pleaded the general denial, and prayed for \$250 special damages as attorney's fees.

The court gave judgment perpetuating the injunction as to the sale of one lot, and ordering the proceeds of the sale of the other to be paid over to the plaintiff.

The evidence shows that the plaintiff was in possession of the lot described in the petition by a title ostensibly valid.

No simulation is charged. It is well settled that such a possession and ownership can not be disregarded. The title of the plaintiff can not be attacked collaterally, even though fraud were alleged, which has not been. 9 M. 648; 1 N. S. 536; 5 N. S. 361, 634; 6 N. S. 139, 325; 2 L. 214; 3 L. 479; 9 L. 484; 11 R. 288; 1 An. 299; 3 An. 640; 7 R. 237; 14 L. 189; 2 An. 912; 12 An. 347.

As to the validity of the judgment of the plaintiff against her husband, from whom she was subsequently divorced, its validity can not be questioned by the defendants, I. W. Arthur & Co. They having intervened to oppose it, were parties and are concluded thereby.

As to the position that Henderson Markham, the husband of the plaintiff, did not own the lot at the time his wife acquired it in 1861, we will remark that the fact is judicially admitted in the petition of I. W. Arthur & Co. in the hypothecary action against Martin Tally, wherein they seek to enforce their mortgage against said property as judicial mortgage creditors of said Henderson Markham. This judicial admission is in the suit under which the sale of the property in dispute is sought, and is in evidence in this case.

 Markham v. O'Connor, Sheriff, et als.

The judgment of the plaintiff against her husband, under which she claims a prior mortgage on one of the lots, was duly recorded on the fourth day of March, 1865, in the parish where the property is situated. In it her tacit mortgage is recognized from the first day of January, 1851, for part of the amount decreed to be due her, and from the first day of November, 1860, for the balance. The registry was sufficient. Sec. 1, act No. 95, acts 1869. The mortgage of the defendants, I. W. Arthur & Co., took effect from its registry, January 24, 1861, and is inferior in rank to the mortgage of the plaintiff.

We see no error in the judgment

Judgment affirmed.

Rehearing refused

No. 236.—J. H. THOMAS & Co. v. THOMPSON SCOTT.

If an act of the General Assembly provides that it shall take effect from and after its passage, the fact that it has not been promulgated in the official journal, as required by law, will not abridge or affect in any manner the rights acquired under it. An attachment bond, which has been given in conformity to law before such law has been promulgated by publication in the official journal, is not therefore void if the law under which it was given directs that it shall take effect from and after its passage, even though the bond be not in conformity with former existing laws on the subject.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Egan, J. N. J. Scott and J. D. Watkins*, for plaintiffs and appellants. *J. & J. W. Young*, for defendant and appellee.

HOWELL, J. Plaintiffs have appealed from a judgment dissolving the attachment herein rendered on a motion based on several grounds, only one of which it is necessary to notice, to wit: "Because the bond is not made payable to the clerk."

They contend that the defendant has no interest in raising this objection, as the object of the law is to protect the parties whose property is seized, and he is protected by the bond in this case, which is made in his own favor.

To this the answer is that in the exercise of this and similar harsh remedies, it is a principle in our jurisprudence that the forms of the law must be strictly complied with under penalty of nullity, and the law invoked requires the bond to be made payable to the clerk of the court, and provides that the defendant, as well as every person party to the suit or injured by the issuing of the writ, shall have recourse thereon against the principal and securities. Acts 1871; p. 18. The interest of the defendant is to have a bond in conformity with the law.

But plaintiffs say this law can not affect their rights in this proceeding, because it was not published in the *Homer Iliad*, "a State and authentic paper," and was not known to them until after the writ was issued, and if allowed to take effect from and after its passage, some

two and a half months previous, it would violate article 110 of the constitution, which prohibits retroactive laws and the divestiture of vested rights, article 109, which requires the laws to be promulgated in the English language, and article 10, which declares that the courts shall be open and every person shall have adequate remedy by due process of law, and justice shall be administered without denial or unreasonable delay.

A reference to the volume of the acts of 1871 shows that the law in question, which is in the English language, was promulgated on the thirtieth December, 1870, the day on which it was approved by the Governor, and was therefore in force when plaintiffs obtained their writ of attachment in March following. The statute itself provides that it "shall take effect from and after its passage," and it has long been settled that such a provision does not violate the terms of articles 109 and 110 of the constitution. 2 An. 63; 12 An. 390; 14 An. 487.

We are unable to see in what respect the law in question is in conflict with article 10. It simply changed the form of a bond which was previously required.

The law under which plaintiffs claim to have given their bond was repealed by the act thirtieth December, 1870, which requires that such bonds shall be made payable to the clerk. See 21 An. 756.

Judgment affirmed.

No. 263.—W. B. GRAVES v. J. G. SCOTT and LEOPOLD BAER.

23	690
125	251

A guaranty is a promise to answer the payment of some debt or the performance of some duty in the case of the failure of another person who in the first instance is liable. It is the contract of suretyship expressed in the terminology of the law merchant, and modified perhaps in some respects thereby.

When, therefore, it appears by the plaintiff's allegations that he delivered cotton to S. on the guaranty of the defendant; that the defendant represented that S. would account for it, and that plaintiff still holds S. liable for it, a case is presented within the statute of 1858, which forbids the reception of parol evidence to prove a promise to pay the debt of a third person. R. S. 1870, 2820.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Nutt & Leonard*, for plaintiff and appellant. *Robert J. Looney*, for defendant and appellee.

HOWE, J. The plaintiff made the following allegations in his petition:

"That at the special instance and request of the said Leopold Baer, and on his special recommendation and the guaranty of the said Leopold Baer, your petitioner delivered to the said John G. Scott twenty-five bales of cotton, weighing five hundred pounds each, on the thirtieth day of December, 1867, as per receipt, a copy of which is annexed and made part of this petition, and that on the twenty-eighth day of January, 1868, he delivered to the said Scott twelve bales of

cotton as agent of A. B. Pate, each weighing five hundred pounds, as per receipt, a copy of which is hereto annexed and made part of this petition."

He alleges that the said Baer induced your petitioner to turn over the said cotton to the said Scott on the representation of the said Baer that the said Scott would account for the same.

"Petitioner alleges that the said Scott has wholly neglected to account for the same, and has left the State of Louisiana after appropriating said cotton to his own use.

"Petitioner represents that said cotton is worth the sum of \$3750, for which the said Scott and the said Baer are jointly and severally indebted to him."

And after alleging amicable demand from Baer, he prayed for judgment *in solido* against both Scott and Baer.

The receipts annexed to the petition read as follows:

"Received of W. B. Graves twenty-five bales of cotton, to be held thirty days subject to charges and advances, and if Doctor Graves places more cotton in my hands to secure me against decline, then to be held or sold as he may direct.

JOHN G. SCOTT."

"Received, Shreveport, January 28, 1868, of W. B. Graves, agent of A. B. Pate, twelve bales of cotton for shipment and sale at discretion of my commission merchant.

JOHN G. SCOTT."

Scott was not cited. Baer answered by a general denial, and a special denial of any knowledge of or responsibility for the transactions between plaintiff and Scott. There was judgment for plaintiff, and Baer appealed.

The only evidence offered by plaintiff was such as attempted to prove by parol the liability of Baer under the pleadings, and was objected to by the latter on the following grounds:

"1. Because the contract sued on is a commercial guaranty, and such contracts must be in writing, and show the consideration in writing.

"2. Because it is not competent to prove any assumption of plaintiff's debt from defendant Scott except in writing.

"3. Because the petition discloses the fact that the contract with defendant [Scott?] was reduced to writing, and it is not competent to contradict, vary or extend the writing, or to prove what was said before or after the execution of the writing."

These objections were overruled by the judge *a quo* on the grounds "that the plaintiff does not sue on a contract in writing, nor does the petition set up a contract to pay the debt of another person."

First—by the statute of 1858 (R. S. 2820), it is provided that "hereafter parol evidence shall not be received to prove any promise

to pay the debt of a third person, but in all such cases the promise to pay shall be proved by written evidence signed by the party to be charged, or by his specially authorized agent or attorney in fact."

Turning to the petition of plaintiff, we find that according to his averments he delivered the cotton to Scott on the guarantee of Baer; that Baer represented that Scott would account for it, and that plaintiff still holds Scott liable for it. We think it plain from these allegations that Scott was the principal debtor in the obligation, and that the contract of Baer was collateral. A guarantee, in the sense in which it is here used, is a promise to answer the payment of some debt, or the performance of some duty, in the case of the failure of another person who in the first instance is liable. Kent's Com., vol. 3, p. 121; Menard v. Scudder, 7 An. 385; Rev. C. C. 3035; Hernes v. Canfield, 9 M. 335.

In other words, the contract of guarantee here sued upon is the contract of suretyship, expressed in the terminology of the "law merchant," and modified perhaps in some respects by the provisions of that law, so far as they are incorporated in the jurisprudence of Louisiana. 9 M. 387.

We must conclude then that the judge *a quo* erred in deciding that the petition did not set up (as against Baer) a contract to pay the debt of another.

The plaintiff insists that under the jurisprudence of England and the common law States upon the statute of frauds, from which statute the provisions quoted from the law of 1858 are derived, the agreement between Graves and Baer was an original contract, and need not be in writing; and he cites the cases of De Wolf v. Rabaud, 1 Peters 476; Douglass v. Reynolds, 7 Peters 113, and Lee v. Dick, 10 Peters 482. In every one of these the *promise* was in writing. In the first the question was whether the *consideration* of this promise could be proved by parol, and the other two cases do not seem to be in point in favor of plaintiff. The numerous cases in which this provision of the statute of frauds has been discussed in England and the other States may be divided into three:

1. Where the guarantee or promise is collateral to the principal contract, but is made at the same time, and is an essential ground of the credit given to the principal debtor.

2. Where the collateral undertaking is subsequent to the creation of the debt and was not the inducement to it, and here there must be some further consideration shown.

3. Where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties.

The two first classes of cases are well settled to be within the statute. In the first the promise must be in writing. In the second the promise

Graves v. Scott and Baer.

and its consideration must both be expressed in writing. In the third no writing is necessary. Kent's Com., vol. 3, p. 121; Leonard v. Vredenburgh, 8 Johnson (N. Y.), p. 31. It is not necessary to decide that all these refinements will govern in the application of our statute of 1858. In some respects they do not. But we can say that looking at the plaintiff's petition from the point of view selected by himself, its case as against Baer falls within the first of these three classes, being collateral to the principal contract, made at the same time, and alleged to form an essential ground of the credit given to Scott, the principal debtor. Such a promise must be in writing.

Second—This parol evidence being excluded, there is nothing left to support plaintiff's case, and the view expressed renders it unnecessary to dwell upon the other objections.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the demand of the plaintiff dismissed, with costs in both courts.

Rehearing refused.

No. 193.—C. G. NUGENT et al. v. JESSE M. RANDOLPH, Tutor.

A suit by the heirs to set aside and annul orders or decrees rendered by the district court homologating their tutor's accounts, and to cause the tutor to render an account, is strictly a probate proceeding, and the parish court is vested with jurisdiction of such action without regard to the amount involved.

A PPEAL from the Parish Court of the parish of Franklin. W. W. Campbell, Parish Judge. Morrison & Farmer, for plaintiffs and appellants. Wells & Corkern, for defendant and appellee.

TALIAFERRO, J. This is a proceeding against the defendant by his former wards for a definitive settlement of his tutorship, commenced in 1858. The plaintiffs allege that on the second of October of that year the defendant, their former tutor, went into possession of their property, of which they give a detailed statement, and fix the amount of it, and also of the balance they allege was due them by their tutor on the second December, 1864. This balance they state to be \$8826 83, subject to several small credits, amounting in all to \$339 30. They attack and allege to be fraudulent, irregular and illegal two judgments rendered the one in 1863, the other in 1866, approving and homologating two accounts of tutorship pretended to be rendered by the defendant in 1863 and 1864. They point out in these accounts items charged against them of large amounts unsupported by vouchers or proof of any kind, and others of large amount which the tutor is not entitled to charge against them, and still other items that are exorbitantly high. They pray that these judgments, orders or decrees of the district court of the parish of Franklin be annulled and set aside,

Nugent et al. v. Randolph, Tutor.

and that the defendant be required to render a full, true, complete and just account of his administration as their tutor; and they claim as due them on final settlement the sum of \$8437 53, with interest at five per cent. per annum from second December, 1864, for which they pray judgment.

The defendant excepted to the action of the plaintiffs on several grounds, the one chiefly relied upon being the want of jurisdiction of the court *ratione materiæ*. The exception was sustained on this ground, and the case dismissed as of nonsuit. The plaintiffs have appealed.

The judgment of the lower court is erroneous. The proceeding is one essentially involving the settlement of a tutor's account. This is a private proceeding, the cognizance of which belongs to the parish court. Code of Practice, article 997. The evidence in the record sufficiently establishes that the two annual accounts homologated by orders of the clerk of the district court of the parish of Franklin, rendered respectively on the third day of October, 1863, and the sixth of August, 1866, are in several respects materially erroneous and unsupported by proof. Justice to all the parties concerned requires that a full and complete account of the tutorship as prayed for by the plaintiffs should be rendered and duly settled.

To this end it is therefore ordered, adjudged and decreed that the aforesaid orders homologating the provisional accounts aforesaid be annulled and set aside; that the defendant, Jesse M. Randolph, late tutor of the plaintiffs, be required to file in the parish court of the proper parish a full, complete and accurate account of his tutorship of the plaintiffs; that this case be remanded to the court of the first instance to be proceeded with according to law. The costs of this appeal to be sustained by the defendant.

No. 249.—J. H. BEARD v. G. W. CHAPPELL. T. M. GATLIN, Intervenor.

A privilege on the growing crop of cotton raised on a plantation in favor of a furnisher of supplies, which commenced after the first of January, 1870, is without effect against third persons, if it has not been recorded. The debtor for supplies being a lessee, the owner of the plantation and the stock thereon is a third person within the meaning of article 123 of the Constitution. If, therefore, the owner of the plantation, a third person, was in the possession of the cotton at the time the privilege was asserted by the furnisher of supplies, then and in such case the furnisher could not hold the same, because not having had his privilege recorded, and the cotton having passed into third hands, the privilege was lost.

APPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Lewis, J. Egan, Williamson & Wise*, for plaintiff and appellant. *Griffin & Snider*, for defendant and appellee.

HOWE, J. Plaintiff sued the defendant Chappell upon a bill of goods sold and plantation supplies furnished, and money loaned to the latter in the year 1869, and claimed a privilege therefor upon certain

Beard v. Chappell—Gatlin, Intervenor.

cotton on the Bear Point plantation, in the parish of Bossier, raised during that year. He also claimed the ownership of certain mules and other personal property on that plantation, and at his instance, in June, 1870, a writ of sequestration was issued against both the cotton and the other property.

The defendant Chappell answered by general and special denials, and alleged that the plaintiff had lost his privilege for supplies by failing to record it. He also made a demand in reconvention

T. M. Gatlin intervened, claiming the ownership of all the property sequestered, and damages for its seizure by plaintiff, which he alleged to be tortious.

The plaintiff answered the petition of intervention by alleging that any sale by which the property had been transferred to Gatlin was simulated.

The judge *a quo*, after trial of the issues thus made up, gave judgment in favor of plaintiff for his entire debt against the defendant, but rejected his claim of ownership of the mules, etc., and of privilege on the cotton, and rendered judgment in favor of intervenor for all the property seized. The plaintiff alone appealed.

The testimony of the numerous witnesses is so vague, confused and conflicting that it is difficult for us to settle the rights of the parties to this litigation with entire accuracy. Under such circumstances we attach even more than usual weight to the opinion of the judge below, who saw and heard the witnesses, and will not reverse his judgment unless manifestly erroneous. Bearing this familiar principle in mind, we will notice the principal points made.

First—The privilege of plaintiff was not recorded, and in this case, commenced in June, 1870, could have no effect against third persons. We are satisfied that the intervenor was a third person in the sense in which that phrase is used in article 123 of the Constitution. The intervenor owned the plantation on which the cotton was seized, and that was in his possession. The contract under which he was thus in possession, whatever may be its legal name, was not a simulation. It was a real transaction, and the intervenor was a real party thereto, and we therefore conclude that the plaintiff could not, in June, 1870, assert against him an unrecorded privilege.

Second—As to the other personal property claimed by plaintiff as owner, we also conclude that the transfer to the intervenor was not a simulation, and that the plaintiff is not the legal owner.

Third—The defendant has asked to have the judgment amended by reducing the amount as against him, but we see no reason to make the amendment. The defendant has not clearly established the credit he claims.

Judgment affirmed.

No. 205.—HODGE RABUN v. WILLIAM H. PIERSON.

The rule which gives to a transaction the authority of the thing adjudged is founded upon the maxim that it is for the interest of the commonwealth that there should be an end of litigation.

A transaction settling the amount due upon notes given for the price of land, movables and slaves, and appearing to have eliminated the slave portion of the consideration, will not be disturbed because the calculations by which such elimination was effected were not exactly accurate, no error of calculation being pleaded.

A transaction fixing the amount due by the debtor at a date certain necessarily excluded testimony offered by him to prove a part payment made two years before such transaction.

APPEAL from the Eleventh Judicial District Court, parish of Bienville. *Watkins, J. Jack & Pierson and W. B. Egan*, for plaintiff and appellant. *John Young and J. D. Watkins*, for defendant and appellee.

Howe, J. In 1860 W. H. Pierson sold to Hodge Rabun a plantation, slaves and movables attached, for the sum of \$29,600, and gave for the price five notes of \$5000 each, and one note of \$4600, falling due respectively in March of the years 1861, 1862, 1863, 1864, 1865 and 1866. The two notes which matured in 1861 and 1862 were paid. In September, 1865, Pierson obtained an order of seizure and sale on the four remaining notes. Rabun enjoined the sale on various grounds, and among others that the land and movables included in the sale were worth but \$9300; that the value of the slaves was \$19,300; that he had already paid the value of the land and movables; that he had been deprived of his ownership of the slaves by the proclamation of the President of 1863, and by various acts of Congress, etc., and that he was therefore discharged by failure of warranty from the debt for the price of the slaves.

On the fifth October, 1865, the parties entered into a written transaction, reciting the sale, mortgage, executory proceedings and injunction suit, and their agreement "to settle the matters in dispute in said proceedings." Rabun agreed to pay as follows: \$2500 on the fifteenth October, 1865, and \$2500 on the first January, 1866. It was then stipulated that on the first payment of \$2500 being made the said proceedings should be dismissed and all the notes save the one last falling due of \$4600 delivered up to Rabun, which note of \$4600 was agreed to be paid as follows: one-third on March 1, 1867, one-third on March, 1868, and the balance March 1, 1869. Sundry arrears of interest were also remitted.

In execution of this contract of transaction the two cash payments therein provided were made; the proceedings therein recited dismissed, and \$1000 paid on the note of \$4600 March 1, 1867. Further payment being refused, Pierson procured another order of seizure and sale on the note of \$4600, less this credit and remitted interest. This pro-

ceeding in turn was enjoined by Rabun, on the ground that the note thus sought to be enforced was a note given for the price of slaves. In answer to this Pierson converted his executory into an ordinary proceeding, and prayed for judgment accordingly. There was judgment in his favor as prayed for and Rabun appealed.

From this statement it appears that at the time the transaction was made Rabun was indebted to Pierson in a considerable amount. The unpaid notes included the prices of land, slaves and movables, and nominally amounted to nearly \$20,000, with large arrears of interest. The value of the slaves, being alleged to be to that of the other property as about two to one, we may say, by way of approximation, that there was due to Pierson, on Rabun's own showing, about six or seven thousand dollars. The question of the validity of slave notes was entirely unsettled, and the question of liability on notes with the mixed consideration of land and slaves was not finally determined by this court until the latter part of the year 1869. 21 An. 757.

The circumstances then presented a proper opportunity for a transaction, which is a written agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. R. C. C. 3071. But this transaction is now attacked by Rabun, the plaintiff in this case. He insists that the note in suit was given for the price of slaves, and that its nullity not being expressly mentioned in the transaction, can still be pleaded.

First—The note in suit was not, as we have seen, a note given for slaves alone, but for lands, movables and slaves. The effect of the transaction was to eliminate from the controversy between the parties the slave portion of the debt, and to leave due the portion which resulted from the sale of land and movables. The parties did for themselves, evidently, what the law would have done for them; what the law did for the litigants in the case of *Sandidge v. Sanderson*. The amount thus determined was represented by two payments to be made in cash, and by the note in suit to be paid in three installments. The note in suit thus became by solemn agreement a representative for its face value of a debt resulting from a transaction, and having, as to all events happening before its date and included in its terms, the authority of the thing adjudged. C. C. 3078; C. N. 2052.

“Quand la paix et l'harmonie sont troublées parmi les citoyens, il est pour les rétablir trois moyens ouverts aux parties:

“La voie judiciaire qui soumet leurs débats à l'autorité publique. * * * * *

“La voie de l'arbitrage qui leur donne des juges amiables et de leur choix. * * * * *

“Enfin, la voie des transactions qui les rend elles-mêmes leurs propres arbitres.” Gillet, Discours, 20 mars 1804.

“Les transactions se font sur une contestation née ou à naître, et les parties ont entendu y balancer et régler leurs intérêts. C'est donc un jugement que les parties ont prononcé entre elles, et lorsqu'elles se sont rendu justice, elles ne doivent plus être admises à s'en plaindre. C'est l'irrévocabilité de la transaction qui met ce contrat au rang de ceux qui sont les plus utiles à la paix des familles et à la société en général.” Bigot-Préameneu, Exposé, etc., 15 mars 1805.

The law which gives to a transaction the authority of the thing adjudged is founded upon the maxim that it is for the interest of the commonwealth that there should be an end of litigation. We do not feel called upon to disturb this thing adjudged by the parties to this suit merely because their calculations may not have been accurate when they plead no error of calculation. C. C. 3078.

Second—The plaintiff insists that the nullity of the obligations given for slaves, not being expressly mentioned in the transaction, can still be set up under article 3080 of the Code. To this we reply that the transaction shows that the question of liability on the slave portion of the debt was considered and settled. It makes no difference what theory of law the parties may have entertained at the time. C. C. 3078. As a matter of fact the effect of their compromise was to separate the price of the land and movables from the price of the slaves.

Third—The judge *a quo* did not err in excluding evidence offered by plaintiff to prove a part payment in 1863. The transaction in 1865 necessarily excluded such testimony.

Judgment affirmed.

No. 179.—THE STATE v. JAMES GIBSON

A bond conditioned for the appearance of a party charged “with having committed the crime of shooting at with intent to kill,” without further terms of description or words to render the sense more definite, is void and without effect.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. W. W. Farmer*, District Attorney, for the State, appellant. *Kidd & Smith*, for defendant and appellee.

TALIAFERRO, J. The defendant being indicted for shooting Henry Boston, with the intent “to kill and murder the said Henry Boston,” was arrested and gave bond, with one J. D. Anderson as surety for his appearance in the proper court at the proper time to answer the charge. Failing, however, to appear, a forfeiture of the bond was declared. The surety moved to set aside the judgment of forfeiture, assigning various reasons therefor, one only of which we deem it important to examine, viz.: that the bond sets forth no crime known

The State v. Gibson.

to the law for which the defendant Gibson was to appear and answer. Judgment was rendered in favor of the defendant Anderson and the State appealed. The bond sets forth its condition to be that, whereas a warrant having issued from the Fourteenth District Court on the — day of —, 1870, "charging the above bound with having committed the crime of shooting at with intent to kill," and whereas the above bound James Gibson has been arrested, etc. Now if the said Gibson shall well and truly appear, etc., the bond to be null, otherwise to remain in full force and virtue.

We think the judgment of the lower court correct. The words "shooting at with intent to kill" are vague, indefinite, and alone define no crime known to the law. The bond can not, in our judgment, be construed as an obligation of the accused and his surety that Gibson shall appear and answer the charge against him contained in the indictment. The surety Anderson was therefore properly released.

Judgment affirmed.

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No. 182.—SILBERNAGEL & Co. v. L. D. BAKER, Administrator.

Under the allegation of ownership in a suit for a lot of cotton, if the plaintiff fails to establish title he can not, in the same action, be permitted to show that he has a lien and privilege on the same cotton to secure the payment of the debt which has not been judicially demanded.

A dation en paiement is incomplete if the thing given in payment has not been delivered.
C. C. 2655, 2656.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd & Brigham*, for plaintiffs and appellees. *Newton & Hall*, for defendant and appellant.

LUDELING, C. J. The plaintiffs sue the defendant for all the cotton grown on the plantation of John W. Baker, deceased, and inventoried as part of his succession, claiming to be the owners thereof by virtue of a verbal sale made by said Baker during his life, and they had the cotton sequestered.

The testimony of the agent of the plaintiffs shows that before his death John W. Baker covenanted and agreed to haul and deliver to plaintiffs, at Prairie Mur Rouge, all the cotton which he made on his home place and on the McCord place, and three-fourths of the cotton made on the Trimble place. It further appears from the testimony of the witness that the cotton was to be given in satisfaction of a debt due by John W. Baker to Silbernagel & Co., estimating the cotton at fourteen cents per pound.

The cotton claimed in this suit was never delivered to Silbernagel & Co.; a part of it seems to have been gathered after Baker's death, and it was all sequestered in the possession of the administrator of the estate of John W. Baker. We do not deem it necessary to con-

sider the questions of law discussed by counsel, orally and by briefs, relative to *sales*, as the contract in question is lacking in one of the essentials of a sale, to wit: a price to be paid in money. The contract was a *dation en paiement*, and it was incomplete for want of delivery. C. C. arts. 2655, 2656.

The plaintiffs' counsel insist that if plaintiffs are not the owners they have a privilege on the cotton to secure their claim against J. W. Baker, deceased. In their petition they allege that they are the owners of the cotton and they pray to have the cotton delivered to them because they are owners thereof. In this court they ask us to allow them a privilege on the cotton to secure an account, for which they have made no demand whatever. The statement of the proposition is enough to show its unreasonableness.

The cases referred to in 5 An. 646, and 7 La. 51 and 152, are not analogous to the one before us.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided and reversed, and that there be judgment in favor of the defendant, setting aside the sequestration and rejecting the plaintiffs' demand, with the costs of both courts.

Rehearing refused.

No. 224.—W. J. KILBOURN v. A. J. PENNEBAKER et al.

The parish court has jurisdiction of a question involving the validity of a will and the recognition of the party claiming as heir, without reference to the amount involved.

In this case the evidence shows that no witnesses that could be had at the time of making the will resided in the place; that a greater number than five who subscribed to the will could not have been procured without endangering the execution of the will itself, on account of the critical condition of the testator at the time.

Held—That under these circumstances the attestation of the will by five witnesses was a substantial compliance with article 1576 of the Civil Code, and that the will was not void on account of its not being attested by a greater number of witnesses

APPEAL from the Twelfth Judicial District Court, parish of Franklin. W. W. Campbell, Parish Judge. H. P. Wells, for plaintiff and appellee. J. C. Seale, for defendants and appellants.

TALIAFERRO, J. The plaintiff, setting himself up as the brother and sole legal heir of John H. Kilbourn, now deceased, institutes this suit to recover his succession, which the decedent gave by act of last will to his wife, Frances C. Jones. The will was duly admitted to probate in the parish of Franklin, where the testator died. The executor named in the will accepted the trust and was duly qualified. The plaintiff attacks the will on the ground of nullity as having been made without observance of the formalities essential to its validity. The instrument is drawn in the form of a nuncupative will by private act and is signed by the testator and attested by five witnesses.

Judgment was rendered in the court below in favor of the plaintiff,

annulling the will and awarding the succession to the plaintiff as heir at law to the testator. The executor and the universal legatee, the parties defendant, have appealed.

In the outset the defendants except to the jurisdiction of the parish court on the ground that the amount in controversy exceeds five hundred dollars. The matters involved are the validity of the will and the recognition of the party claiming as heir—questions of which the parish court clearly has jurisdiction. The exception, therefore, is without force.

The testimony in the record as to the execution of the will is pretty full and seems to show that all the formalities required by the articles 1573, 1574, 1575 and 1576 of the Civil Code were complied with. The plaintiff seems to rely with more confidence upon the point that the will was not subscribed by the required number of witnesses. Article 1576 declares that: "In the country it suffices for the validity of nuncupative testaments under private signature, if the testament be passed in presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of that place, provided that in this case a greater number of witnesses can not be had." In this case the will was passed in the country and signed by five witnesses. Four of these witnesses, it seems clearly established, lived "out of the place" where the testament was signed; that is, that they were residents of the parish of Madison, on the opposite side of the Bayou Mason from Warsaw, the place of residence of the testator, which lies on the west bank of the bayou, in the parish of Franklin. The residence of the other witness is not so clearly fixed.

It is argued that all the witnesses required to testaments of this form must be either residents of the place or residents out of the place where the testament is received; and that the residence of one of the five not being positively shown the presumption is that he resided in the place where the will was made, and, therefore, the act is null because it was not signed by five witnesses living out of the place nor by three living in the place where the testator delivered his testament. If there were any force in this reasoning it lay with the plaintiff alleging the nullity of the instrument on the ground of the incompetency of the witnesses to show that one of them resided in the parish of Franklin. This he has certainly not done. Calvin Moore, a notary public of Madison parish, who drew up the will under the dictation of the testator, and who, from the instrument itself and the testimony he gave in regard to the manner in which the required formalities were observed on the occasion, it is clear is a competent person in matters of the kind, says in regard to the witnesses who signed the will: "Kilgore, Williams and I lived in Madison parish, and I think the other two did." The executor states in his testimony

that he was not positive "whether T. J. Pennebaker (the witness whose residence is not fully established) lived in Madison parish or not." But whether he resided in Madison or Franklin we deem it unimportant to inquire.

There were five witnesses to the will, and we think it fair to conclude they all resided in Madison parish. The only inquiry remaining is, could a greater number have been obtained? The plaintiff assumes the affirmative of this question, and offers testimony to sustain it. Moore, who drew up the will, states that he lived at the distance of six miles from the place where the will was passed, and that Benjamin Kilgour and Jack Harper lived in Madison parish at the time, and nearer to the testator's residence than Moore himself did; that Montgomery's place, in Madison parish, was within a mile, and that there were five freedmen there. But Moore also says that the testator had been removed only a short time previous from his former residence in Madison parish, and when called as a notary public of that parish to draw the will, he set out to go, as he supposed, to the previous residence of the testator, much nearer his own residence than Warsaw, and that if he had known of the removal of the testator to Warsaw, he should probably not have gone at all. He states that the day was rainy, the section of the country around was visited with the calamity of overflow; that the people were occupied in driving their stock off to highlands, and that it was owing to that circumstance that they were enabled to obtain the witnesses who assisted in passing the will, they being men who had come that day to cross their stock over the Bayou Mason. Williams, a witness, says there were but two men at Warsaw, one of them the person who was appointed the executor, and the other a merchant who was importuned to attend as a witness, but refused positively for the reason that he had no clerk to attend the store if he left it. The testator, although he lived about thirty hours after he signed his testament, it is clear was in a dying condition. Moore, in his testimony, says of the testator: "He was very feeble; I had great fears that the exertion of dictating and signing the will would cause him to sink more rapidly. I believed at the time if there was delay sufficient to get a larger number of witnesses, the deceased would not be able to sign his will at all."

It may not have been impossible to procure more witnesses, but the circumstances which are shown to have existed rendered greater efforts than were used to obtain them unnecessary. Under the facts existing, the requirements of the law were sufficiently complied with. In the case of *Maria and another v. Edwards, executor, and another*, 1 Rob. 360, this court said: "Article 1576 does not contemplate a physical or absolute impossibility; reasonable diligence to procure the witnesses is all that is required." 1 Martin, N. S. 488; 12 L. 483; 2 An. 724.

Kilbourn v. Pennebaker et al.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the act of last will of the testator, John H. Kilbourn, be confirmed and held valid; that the defendant, Frances C. Jones, widow of the testator, be recognized as universal legatee under the said will, and that the defendant Pennebaker, the executor, be allowed to proceed with the administration and settlement of the succession. It is lastly ordered that the plaintiff and appellee pay all costs of this suit.

No. 194.—JOHN W. WANSLEY v. JOHN W. WILLIS.

An unconditional offer to pay a debt is such an acknowledgment as will interrupt the current of prescription. Such offer or acknowledgment may be proved by parol evidence.

APPEAL from the Twelfth Judicial District Court, parish of Franklin. *Crawford, J. H. P. Wells*, for plaintiff and appellee. *Morrison & Farmer*, for defendant and appellant.

TALIAFERRO, J. The plaintiff brings suit on a promissory note for the sum of \$880, with interest at the rate of eight per cent. per annum from the sixteenth of May, 1861, the day the note fell due. An exception was filed to the legality of the citation, on the ground that the device upon the seal attached or impressed upon the citation does not correspond with that upon the seal of the State. It appears, however, that the words "State of Louisiana, Twelfth District Court, parish of Franklin," are clearly legible on the seal and its impress on the citation. The answer sets up the plea of usury. And lastly the plaintiff is met with the plea of prescription.

Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The plea of prescription is the only defense deserving much consideration. The plaintiff by his own testimony aims to show an acknowledgment of the debt of the defendant in 1863, and the contest turns upon the construction to be given to what was said by the defendant at that time, it being contended by him that he made no acknowledgment of the debt, but only an effort to pay the note, provided the plaintiff would receive Confederate money. The statement of the plaintiff is in these words: "In the year 1863 defendant acknowledged the debt and offered to pay it in Confederate money, which I refused to take. That was near about the time of the fall of Vicksburg." Under cross-examination he said: "Near the fall of Vicksburg; think it was afterwards; can't say positively. Mr. Willis and I were at Oakley Church in this parish when this conversation took place. There were several near; don't recollect that any one was close to us. Willis was then on his way to Texas, as he stated.

He offered to pay me in Confederate money. He stated he had plenty of it and wanted to settle that. I told him that was not the kind I loaned him. He talked a good deal, trying to get me to take Confederate money. That is all the conversation we had on the subject in 1863."

The language of the witness here is broad and direct that the defendant in 1863 "acknowledged the debt," adding, it is true, in the same sentence, "and offered to pay it in Confederate money;" but taking the plain import of the words used, we understand that the defendant recognized his obligation to pay the debt, and the recognition was not made to depend upon the condition that his creditor would receive Confederate money. The testimony is in substance that he admitted owing the debt, and was desirous to discharge it by the payment of Confederate money. We think there was an acknowledgment of the obligation that interrupted prescription.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

23	704
125	814

No. 234.—ALLEN GREEN v. J. G. HUEY, Sheriff, et al.

It being the custom in the country parishes of the State for the judge to sign all judgments on the last day of the term, an appeal will not be dismissed because it was granted before the judgment was signed, if the judgment, as appealed from, has been signed afterward by the judge.

An injunction that has been issued by the parish judge, acting in the place of the district judge, will not be dissolved on that ground, if it be shown that the district judge was absent from the parish at the time.

The amount of the bond to obtain an injunction to stay the execution of a judgment must be fixed by the judge who grants the order.

In an injunction suit, the surety on the bond is a party to the suit, and is bound by the allegations in the petition, the affidavit, etc., the same as the principal.

APPEAL from the Eleventh Judicial District Court, parish of Jackson. *J. W. Pierson* (attorney at law), judge *ad hoc*. *Richardson & McEnery* and *John Ray*, for plaintiff and appellant. *J. & J. W. Young*, for defendants and appellees.

TALIAFERRO, J. C. Yale, Jr. & Co. having issued execution against John G. Randle & Co. upon a judgment rendered against that commercial partnership in 1853, and caused to be seized by the sheriff certain lands, the property of Allen Green, who had been one of the partners of the firm of John G. Randle & Co., Green sued out an injunction to stay the execution, alleging several grounds why the judgment of C. Yale, Jr. & Co. should not be executed, and chiefly that the judgment was prescribed by the lapse of more than ten years from its rendition before the issuance of the execution, the judgment not having been revived according to law to continue it in force.

The defendants in injunction moved to dissolve the writ, and assigned the following grounds:

Green v. Huey, Sheriff, et al.

First—That the parish judge who issued it was without power *ratione materia* to do the act.

Second—That the bond is insufficient in amount.

Third—That the parties executing the bond are not bound jointly and severally, and they can not be condemned *in solido* in damages.

Fourth—That the bond is further defective for the reason that it does not set forth what proceedings of the sheriff the injunction is directed against.

There was judgment in the lower court dissolving the injunction, the judge *a quo* considering the bond insufficient in amount. The plaintiff appealed.

There is a motion to dismiss the appeal on the ground that it is premature, the appeal having been taken before the judgment became definitive by the signature of the judge. We think this is not a sufficient reason for dismissing the appeal. Our predecessors so decided in a case found in 12 An. 289, predicated their decision upon the general custom in the country of signing judgments on the last day of the term, deeming it sufficient that the appeal be taken at the same term of the court. To this view of the question we incline to adhere. See also 15 An. 521. The motion to dismiss is therefore overruled.

Recurring to the grounds of the motion to dissolve

First—It is shown by affidavit that the district judge was absent from the parish at the time the parish judge rendered the order for the injunction.

Second—The amount fixed by the order of the parish judge for which the bond was to be given is \$5000. For this amount the bond was given, and being for a stay of execution, we think the plaintiff complied with the law in executing his bond for the amount fixed by the judge. C. P. article 304.

Third—In becoming obligors on judicial bonds, the parties contract in reference to the law. C. P. article 304; 1 An. 157

Fourth—The surety is a party to the suit, and his obligation is regulated by the petition, affidavit, order of the judge, etc., and any descriptive omission in the bond is cured by reference to them. 12 An. 68; 15 An. 465. The bond being among the papers with the title and number of the suit upon it, shows sufficiently what proceedings of the sheriff are enjoined.

It is apparent from the record that the plaintiff would be entitled to another injunction if this should fail through informality.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the injunction be perpetuated, the defendants and appellees paying costs in both courts.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

NOVEMBER, 1871.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. W. W. HOWE,

} *Associate Justices.*

No. 3492.—ANN P. HARRISON v. L. B. JENKS—The M. & R. F.
Company, Appellant.

28 707
48 708

Furniture lodged in a building by the lessee is pledged to the landlord for the payment of the rent. A seizure of it by the landlord, and a release of the seizure by the lessee's giving bond, does not destroy or impair the privilege accorded by law in favor of the landlord. A seizure or sequestration by a creditor after the property has been released on bond will not therefore interrupt or affect the privilege already existing for the payment of the rent.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Cotton & Levy*, for plaintiff. *Hornor & Benedict*, for third opponents, appellants.

Howe, J. On the nineteenth May, 1871, the Mitchell & Rammelsberg Furniture Company sequestered certain furniture in the house occupied by Jenks, claiming the vendors' privilege. The furniture does not appear to have been removed from the premises.

On the twenty-third May the plaintiff, Mrs. Harrison, provisionally seized the same property for rent of the house thus occupied by Jenks, the furniture still being on the premises.

On the twenty-fifth May the provisional seizure for rent was released and the property ordered to be restored to Jenks upon his giving bond under article 287, R. C. P., which bond was given.

Ann P. Harrison v. Jenks—The M. & R. F. Company, Appellant.

On the eighth of June the Mitchell and Rammelsberg Furniture Company obtained judgment with privilege, and on the twenty-sixth June issued writ of *fi. fa.*

On the nineteenth June Mrs. Harrison obtained judgment with privilege, and on the twenty third June issued *fi. fa.* The property was sold under the latter *fi. fa.*, and the contest before us, in which the Furniture Company is appellant, is in regard to priority of right to the proceeds.

The appellant contends that the bond given by Jenks in release of the writ of provisional seizure was a substitute for the property, that the property was no longer under the control of the court, and that therefore, as we understand the argument, it at once fell back into the grasp of the appellant's sequestration issued to secure its vendor's privilege, and the cases of *Dorr v. Kershaw*, 18 La. 58, and *Bell v. Alexander*, 1 Rob. 278, are cited in support of this theory.

The cases cited were of attachment, where the privilege sprung from seizure only, and perished with the release of the seizure. The case before us, however, is one of a privilege, properly so called, springing from the nature of the debt, a privilege which a seizure does not give nor a release of seizure take away. The fact that Jenks gave a bond did not extinguish the lessor's privilege. R. C. C. 3277. It only added another to the extraordinary safeguards with which our law chooses to hedge the landlord, and we do not see that the appellant, as vendor, choosing to deliver the property to a lessee, can legally complain of the result occurring in this case. *Blanchen v. Fashion*, 10 An. 49.

Judgment affirmed.

No. 1864.—CITY OF NEW ORLEANS v. GEORGE RULEFF et als.

The issuing of a writ of *feri facias* on a judgment against the city of New Orleans is prohibited by statute. An injunction will therefore issue restraining the execution of such writ if it has already issued.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* George S. Lacey, City Attorney, for plaintiff. *C. Roselius & Philips*, for defendants and appellees.

HOWELL, J. The city of New Orleans has appealed from a judgment dissolving an injunction restraining the seizure and sale of certain lots of ground seized under execution in favor of defendants.

Since the appeal was taken the Legislature has enacted a law prohibiting the issuance of writs of *feri facias* against the city, and providing another method for satisfying moneyed judgments against said corporation. Under this law the injunction must be maintained.

It is therefore ordered that the judgment appealed from be reversed and the injunction herein perpetuated with costs in both courts.

No. 3422.—PATRICK LYONS v. DYMOND & LALLY.

In an action on account for work and labor performed under an agreement, the objections by the defendant that it was not done within the time specified, and was not satisfactorily done, comes too late if not made until after the work has been done.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cooley & Phillips*, for plaintiff and appellee. *A. Pitot*, for defendants and appellants.

WYLY, J. This is an action for the balance of an account. The controversy as to the correctness of the account is only in relation to the items for ditching which embrace the largest part thereof.

The defense is that the work performed by plaintiff was not done according to the terms and conditions of agreement entered into by plaintiff, and that for the work as done the plaintiff was paid more than the value thereof; that the work was not completed at the time specified, some of it having to be done *de novo*, to the damage of \$1000 to the defendants, and that by the amount paid from time to time the plaintiff was overpaid for the value of the work \$938 83. The prayer of the answer is that the demand of the plaintiff be rejected, and that the respondents have judgment in reconvention for \$1938 82.

The court, rejecting the reconventional demand, gave judgment for plaintiff for \$1481 67, the balance found to be due him on the account. The defendants have appealed. After a full examination of the evidence we have come to the conclusion that the judgment is correct.

The account sued on by the plaintiff was rendered to him by one of the defendants, and the work now complained of as unsatisfactorily performed was received by the agent of the defendants. Their agent was on the premises during the time the work was being performed, and saw its progress from day to day. If it was unsatisfactory and not done according to the agreement, it should not have been received. If the items for ditching were not correct, the defendant Dymond should not have embraced them in the statement of account which he rendered to the plaintiff, and upon which this suit was instituted. There is no error shown for thus inserting these items in the account. On the contrary, from the defendant Dymond's own sworn statement, he was aware of the objections he now urges to them; yet he voluntarily debited himself therewith in the account rendered as aforesaid. Add to these important facts the testimony of the witnesses in behalf of the plaintiff, and there can be no doubt of the correctness of the judgment now under revision.

In the face of these facts and the testimony of the witnesses corroborating them, we attach but little weight to the evidence of the defendant Dymond, the most important witness in behalf of the defense.

Judgment affirmed.

No. 1221.—CITY OF NEW ORLEANS v. E. A. BIENVENU.

11 A notary public is an officer of the State, who holds his appointment from the Governor by and with the consent of the Senate. The city of New Orleans has therefore no right or authority to impose a license tax on such officer in his official character. The permission given to the city to impose a license tax on trades, occupations and professions does not include an authorization to impose a tax on a notary public or other State officer.

APPEAL from the Fourth Justice's Court, parish of Orleans. *A. Viavant*, Justice of the Peace. *George S. Lacey*, City Attorney. *F. B. Earhart*, in *propria persona*, defendant and appellee.

Howe, J. The defendant has appealed from a judgment against him for the amount of a license tax imposed by the city of New Orleans upon him as notary public in and for the parish of Orleans.

The judgment was, we think, erroneous. A notary is an officer appointed by the Governor by and with the advice and consent of the Senate, and commissioned and sworn as such, and the city of New Orleans has no right, at least in the absence of some express permission, to impose a tax on such an officer in his official character.

A permission to impose a license tax on "trades, occupations and professions," can not be held to include an authorization to impose a tax on a notary.

It is therefore ordered that the judgment appealed from be reversed, and the suit dismissed at plaintiff's costs.

No. 3501.—STATE ex rel. W. B. MERCHANT, District Attorney Third Judicial District, v. HENRY TRAIN, Judge Third Judicial District

Under the act of 1868, amending the act of 1855, relative to a change of venue in criminal cases, the judge of the district court is required to grant such change on the application of the Attorney General, the district attorney or the district attorney *pro tem.*, on behalf of the State, without giving any other reasons therefor than those embraced in the application. The writ of mandamus will, therefore, issue from the Supreme Court on the application of the district attorney, directing the judge *a quo* to grant the change of venue, such order being issued by the Supreme Court in aid of its appellate jurisdiction.

APPLICATION for a Writ of Mandamus. *W. B. Merchant*, District Attorney Third Judicial District, relator. *Train*, Judge, respondent.

TALIAFERRO, J. This is an application to this court by the district attorney of the Third Judicial District, for a mandamus to compel the judge of that district to grant a change of venue from the parish of Iberia to the parish of St. Mary, on the ground, as alleged by the attorney, that a competent jury can not be had in the parish of Iberia for the trial of a criminal prosecution commenced there against one Alexander Blanc, and that it is necessary, in order to subserve the ends of justice, to procure a change of venue. The usual preliminary order was rendered and the judge answered, placing his refusal to allow the

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change of venue on the ground mainly that there was no sufficient showing made of the necessity for such an order, and that the case is one in which, by law, he is vested with discretion to grant or refuse a change of venue upon the evidence and state of facts presented. He relies upon the act of 1855, sections 48, 49 and 50, and deduces from the sections 1021, 1022 and 1023 of Ray's Revised Statutes the same discretionary power in the judge that is conferred by sections 48, 49 and 50 of the act of 1855, conceding, however, that there is a material difference between section 1021 of the Revised Statutes and section 48 of the act of 1855 as to the time when the application is to be made, the former not containing, as the latter does, the provision that prior to entertaining an application for a change of venue the judge must be shown that no competent jury of the parish can be had after exhausting two successive panels.

The respondent reviews at some length in the reasons assigned for refusing the application, the general law on the subject of change of venue and cites various authorities under the common law as well as decisions of our own court. He refers to the decisions by this court that it is without authority to direct an officer how to do an act the law requires him to do, and that it will not issue the writ of mandamus ordering the doing of an act when there exists a discretion in the officer to do it or not.

On the part of the relator it is held that a material alteration of the law relating to a change of venue has been made by the statute enacted in 1868, under the constitution of 1868, and that the statute of 1855 is, to the extent of that alteration, repealed. The gist of the matter in issue, then, is as to whether there has been such alteration made in the provisions of the act of 1855 as contended for by the relator, and whether, under the law as it now exists, it is the duty of the judge to render an order changing the venue in a criminal prosecution whenever an application for that purpose is made by the district attorney, and that without the exercise of discretion on the part of the judge.

The forty-eighth section of the act of 1855 (acts of 1855, page 158,) provides: "That upon the application of the Attorney General or any district attorney of this State, the judge shall have full power to change the venue in behalf of the State in any case where it shall be made apparent to the court that no competent jury of the parish can be had after exhausting two successive panels."

The act of 1868, section one, provides: "That upon the application of the Attorney General or any district attorney or district attorney *pro tempore* of this State, the judge of any court exercising criminal jurisdiction in this State shall, of his own accord, have full power to change the venue in any criminal prosecution when, in his judgment,

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a competent jury of the parish can not be had, and in either case the venue shall be changed to any parish in that or any adjoining district where, in the opinion of the judge, a competent jury is likely to be obtained."

Here, it is seen that by the act of 1855 no change of venue in behalf of the State was allowed, except on condition that it was made apparent to the judge that no competent jury of the parish could be had, and that, after having exhausted two successive panels in the effort to obtain a fair and impartial jury. This condition does not appear in the act of 1868. That act purports to amend and re-enact the forty-second section of the act of 1855. The amendment dispenses entirely with any showing to the court of the inability to procure a competent jury. The language used is mandatory to the judge that *he shall*, in any criminal prosecution, change the venue in behalf of the State upon the application of the Attorney General or any district attorney or district attorney *pro tempore*. When an application is made for a change of venue on the part of the State by any of the officers named, it seems that the judge is clearly left without discretion whether to grant it or not. He is clothed with the power *propria motu* to order a change of venue in behalf of the State when, in his opinion, a competent jury can not be had. In the exercise of this power, which is independent of any action on the part of the district attorney or other officer of the State, he may exercise a discretion. But it seems clear that he is without any when the application is made by the proper officer. This case comes within the category of cases in which it has been frequently announced this court may issue the writ of mandamus in aid of its appellate jurisdiction.

It is therefore, for the reasons stated, ordered that the mandamus in this case be made peremptory.

No. 3515.—WILLIAM BARRETT v. A. P. HARD.

A compromise between a creditor and his debtor, whereby the creditor agrees to take a less amount than is due in payment of his demand, provided the debtor makes payment within a given time, is terminated if the debtor fails to make the payments within the time specified in the compromise.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. E. Filleul*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment perpetuating the injunction sued out by the plaintiff to restrain the execution of the judgment which the defendant has against him.

The ground for the injunction is that subsequent to the rendition of the judgment against the plaintiff, he made an agreement with the

Barrett v. Hard.

defendant by which the latter agreed to take fifty cents on the dollar for the amount of the judgment as a settlement in full therefor, stipulating the payment of the amount within a limited time to the attorneys of the defendant, and that in pursuance of said agreement the amount due thereunder on said judgment was duly tendered to the attorneys of the defendant, and refused by them.

From the evidence it appears that the defendant agreed to relinquish or compromise with the plaintiff in relation to the judgment which he held against him, provided the plaintiff would within forty days pay to the attorneys of the defendant fifty per cent. on the amount of the judgment, and also their fees exceeding or beyond the \$200 which had already been paid to them by the defendant. The amount of the fees of the attorneys was \$450; \$200 thereof having already been paid, the remaining balance was \$250. It appears that the plaintiff failed within the time limited to pay the amount due on the judgment, and the amount due to the attorneys of the defendant according to the stipulations in the act of compromise. He, however, tendered part of the amount, which the attorneys refused to accept. Having failed to comply in full with the conditions of the compromise the contract terminated, and the defendant clearly had the right to execute his judgment against the plaintiff.

Let the judgment of the court *a qua* be annulled, and let there be judgment for the defendant dissolving the injunction herein, with costs of both courts.

No. 3443.—STATE ex rel. SIMMONS v. THE JUDGE OF THE FIFTH DISTRICT COURT.

Where an interlocutory judgment if erroneous would work an irreparable injury, the party against whom it has been rendered has the right to have it reviewed on appeal. In such a case a mandamus will issue on application, directing the judge *a quo* to grant the appeal.

APPPLICATION for a Writ of Mandamus. *Race, Foster & E. T. Merrick*, for relators. *Leaumont*, Judge, respondent.

HOWE, J. We think the appeal asked for by the relators should have been allowed. The judgment directed the sheriff to return to the firm of Howard & Prestons the sum of \$1000 in his hands, which relators claim was collected by the sheriff for them, and should be paid to them. If this judgment be merely interlocutory, it is one which if erroneous would be held in a legal sense to work an irreparable injury. The relators have a right therefore to submit to this court the question whether it is erroneous or not.

Mandamus made peremptory.

State ex rel. Lynch et als. v. The Judge of the Second Judicial District Court.

No. 3588.—STATE ex rel. PEYTON B. LYNCH et als. v. THE JUDGE
OF THE SECOND JUDICIAL DISTRICT COURT

After the appeal bond has been given and filed in the record the jurisdiction of the appellate court attaches, and the jurisdiction of the court *a quo* over the case is limited to the inquiry as to the solvency of the security on the bond. If a rule be taken by the appellee before the judge *a quo* to set aside the appeal on the ground that the surety is not good and solvent, the Supreme Court will, on application for a writ of prohibition, examine the evidence taken in the court below on the rule to set aside the appeal.

The failure of the appellant to qualify the surety on the appeal bond will not authorize the judge *a quo* to dismiss the appeal, but the writ of prohibition and not that by mandamus is the proper remedy for the appellant in such a case.

APPPLICATION for a Writ of Mandamus. *Pardee, J. B. O. Elliott,* for plaintiff in rule. *Race, Foster & E. T. Merrick,* for defendant in rule.

WYLY, J. The complaint in this case is, that the judge has improperly set aside the devolutive appeal taken by the relators in the case of *P. B. Lynch et als. v. A. J. Miller et als.*, on the ground that the surety on the appeal bond is not good and sufficient.

In answer to the mandamus the judge states that "the plaintiff did not take any legal steps to justify the surety, as will more fully appear by the annexed copy of the petition for appeal, appeal bond and proceedings upon the rule made a part of this answer and return marked 'A.' The relator did not present any new bond for my consideration, and merely asked leave to file one at a future day. Not knowing any law to justify me in refusing to pass upon the rule taken, and allow a delay for the substitution of a new bond to be executed at a future day at the pleasure of appellants, I proceeded in my judicial capacity to pass upon the rule, and there being no proof of the sufficiency of the appeal bond the appeal was dismissed, and no bill of exceptions was taken to my ruling in refusing the delay to procure a new bond."

Upon his own showing, the District Judge had no ground to render the order dismissing the appeal, there being no proof that the surety on the bond for devolutive appeal was insufficient.

The fact that "the plaintiffs did not take any legal step to justify the surety," did not authorize the judge to render the order setting aside the appeal. One might neglect to justify his surety and yet the latter might be the most solvent person in the State.

It is well settled that after the appeal bond has been given the court of the first instance can only inquire into the solvency of the surety, and that this court will examine the evidence taken in relation thereto on an application for the writ of prohibition. In order to justify the decree setting aside the appeal the insufficiency of the surety must be shown affirmatively by competent evidence. 22 An. 591. The surety accepted on the bond in such cases is presumed to be good, and if so, the jurisdiction of this court over the appeal is unimpaired,

State ex rel. Lynch et als. v. The Judge of the Second Judicial District Court.

notwithstanding the failure of the appellant to justify or prove the solvency of his surety in the court *a qua*. 21 An. 730, 733, 736; 22 An. 115, 591.

But the relators have mistaken their remedy. It is by the writ of prohibition and not by mandamus. 21 An. 113. The relief sought can not, therefore, be granted.

It is therefore ordered that the mandamus applied for be disallowed, and that the petition be dismissed at the costs of the relators.

Mr. Justice Howell took no part in this decision.

No. 1872.—ST. CHARLES HOTEL COMPANY v. J. L. TARBOX & Co.—J. D. HAMILTON, Intervenor.

Movable property belonging to the lessee, and placed by him on the leased premises, is pledged to the landlord for the payment of the rent. C. C. 2675. Such property may be seized by the landlord while on the premises or within fifteen days thereafter, provided the lessee continues to be the owner. But if the lessee ceases to be the owner, then and in that case it can not be seized for the rent after it has been removed from the premises.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Armand Pitot*, for plaintiff and appellee. *Emmet D. Craig*, for intervenor, appellant.

LUDELING, C. J. The plaintiff seized the stock and fixtures of the defendants, in the basement of the St. Charles Hotel, under an order of provisional seizure, for rents, and some days afterward a further seizure was made of some furniture found off the premises, in the possession of the intervenor.

The evidence shows that the furniture last seized had been transferred and delivered to Hamilton by a *datien en paiement*, and that he had removed them from the premises leased before the seizure. Article 2675 of the Civil Code gives to the lessor a right of pledge on the movable effects of the lessee, which are found on the property leased; and articles 2679 of the Civil Code and 238 of the Code of Practice authorize the seizure thereof while on the premises leased, or within fifteen days after they are taken away without the consent of the lessor, *provided they continue to be the property of the lessee*. In this case the evidence shows that the furniture claimed by the intervenor had ceased to belong to the lessee. 16 An. 350, *Delband v. Pickett*, Stewell, intervenor.

It is therefore ordered and adjudged that the judgment of the district court be set aside, and that there be judgment in favor of the intervenor recognizing him to be the owner of the furniture described in his petition, and for costs of both courts.

State ex rel. Board of School Directors of the Parish of Bossier v. Graham, Auditor.

No. 3604.—STATE OF LOUISIANA, ex rel. BOARD OF SCHOOL DIRECTORS of the Parish of Bossier, v. JAMES GRAHAM, Auditor.

School directors of any parish district or ward may be removed from office by the State Board of Education on charges of negligence, incompetency, or violation of law, after a due hearing and fair trial. The removal of any director by telegram issued by the State Superintendent, or the district superintendent, or by the order of either of them, is absolutely null and void. The Auditor of Public Accounts can not, therefore, refuse to issue warrants in favor of such directors for school moneys belonging to their district on the grounds that he has been notified that they have been removed from office by the State Superintendent.

APPEAL from the Eighth District Court, parish of Orleans. *Emerson*, Judge of the Third District Court, presiding in the Eighth, in place of Dibble, Judge, absent. *Dennie & Belden*, for relator, appellee. *William Grant*, for the Governor, appellant.

WYLY, J. The Governor of the State has appealed from the judgment rendering peremptory the mandamus sued out by the relators to compel the Auditor to issue to them, in their representative capacities, warrants to the amount of \$37,519 07 claimed by them to be due from the State treasury to the parish of Bossier for public schools.

Auditor Graham, the defendant, has not appealed.

The answer sets up two grounds of defense only:

First—The Auditor avers “that he has hitherto acknowledged the relators as the school board of the parish of Bossier, but that on the first day of October last and since he has been notified by J. Sella Martin, Superintendent of Education, Fourth Division of Louisiana, that they have been removed, and like information has been given him by the Secretary of the State Superintendent of Education, and in view thereof he declines to exercise any discretion in the premises, and having notified the State Board of Education of the demand herein, he prays his action be affirmed.

Seccond—And respondent, for further cause, sets forth that the orders or certificates presented by relators are not signed as required by law, and he can not issue his warrants for the same as the relators demand.”

It is not denied that the amount for which warrants are demanded is due the school directors of the parish of Bossier, besides the fact is shown affirmatively. It is shown that the relators are the school directors of said parish, that they were duly appointed and qualified, and that their term of office has not expired. The effort to show their removal from office is a failure. Neither the telegram of the State Superintendent of Education nor the letter of the Superintendent of the Fourth Division could divest the relators of office, because the law declares that “the State Board of Education shall have power to remove any parish or district school director for negligence, incompetency or violation of law, after a due hearing and fair trial.” Ray's Digest, 533, section 29. It is not shown that the State Board has ever

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removed the relators from office, and the attempt to do so by unauthorized parties is utterly void.

The second ground of defense is also untenable. The "orders or certificates presented by the relators" are signed by the Secretary of the State Superintendent of Education, and this must be deemed sufficient, because it is not denied that the apportionment stated in said certificates is correct. It is not denied that the parish of Bossier is entitled to the amount of warrants claimed, but the main contest seems to be as to the authority of the relators to receive the warrants in view of their alleged removal from office.

As to the irregularities complained of by the appellant in the proceeding by mandamus against the State Superintendent of Education by which the relators obtained the certificate of apportionment, we will remark that the judgment therein has not been appealed from; that it was duly executed, and its correctness can not be examined in revising the appeal in this case.

Judgment affirmed.

No. 3439.—STATE ex rel. MRS. A. TUREAUD v. PARISH JUDGE of Ascension.

A garnishee who has taken an exception to the right of the plaintiff to require her to answer interrogatories, may appeal from the judgment overruling the exception if the amount involved is sufficient to give the appellate court jurisdiction.

The fact that the garnishee subsequently answers the interrogatories which disclose a liability, can not be construed into a confession of judgment so as to defeat the right of appeal.

APPPLICATION for Writ of Mandamus. *Trist & Oliver*, for relators.
E. A. Mason, Parish Judge, respondent.

HOWELL, J. The relator having been made garnishee under writs of *feri facias* in several suits, answered that she had in her hands, belonging to the defendant in said suits, a large sum of money, but filed with her answers an exception (which was reserved in the answers) to the right of the plaintiff to require her to answer the interrogatories, on the ground that after the service thereof the seizure had been abandoned by the return of the writs without retaining copies. From the judgment dismissing the exception and ordering her to pay the money to the sheriff, she asked for a suspensive appeal, which was refused by the parish judge, acting in the absence of the district judge, whereupon she applied to this court for a mandamus.

The judge answers that the judgment from which an appeal is sought is interlocutory, and can work no irreparable injury, that no execution can issue on said judgment, which amounts to a confession of judgment, and is therefore not appealable.

State ex rel. Mrs. A. Tureaud v. Parish Judge of Ascension.

Whether the exception be well made or not, is a question to be determined only on appeal, and not in settling the right to an appeal. The garnishee having denied the right of plaintiff in execution to require the interrogatories propounded to be answered, and having filed answers with a reservation of the issue thus raised, she is entitled to have the action of the judge *a quo* dismissing her exception and condemning her to pay, reviewed on appeal, whatever may be the real merits of her defense.

We apprehend it will not be questioned that a party has the right under our Constitution and laws to take an appeal when the amount involved is sufficient, even if such appeal should afterward be declared frivolous, unless the case is within the prescribed exceptions. This case is not in that category. It is not properly a confession of judgment from which no appeal lies, as the admission of having money belonging to the debtor does not in this instance necessarily admit the right of the creditor to it. The amount involved is sufficient, the judgment is a final one, and the appeal was applied for in due form within the legal delay. Under such circumstances, it should have been allowed.

It is therefore ordered that the mandamus issued herein be made peremptory.

No. 3122.—Succession of G. W. L. MARR, deceased—Opposition of Heirs to Administrator's Account.

An administrator is personally responsible to the heirs for money which he has received belonging to the estate he represents, if he pays the same to a person not authorized to receive it.

An administrator of an ancillary estate situated in Louisiana, whom it is shown has acted in good faith, ought not to be inflicted with the stringent penalties denounced by statute against delinquent administrators.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. B. R. Forman*, for appellants. *Randolph, Singleton & Browne*, for appellees.

TALIAFERRO, J. The facts on which this controversy is based seem to be as follows: G. W. L. Marr died in Tennessee, and his son Richard became Administrator of his estate. Lonsdale, of New Orleans, was indebted to G. W. L. Marr in the sum of \$3000, as shown by three several promissory notes of \$1000 each held by Richard Marr, the administrator, who, coming to New Orleans to collect these notes, found the debtor unwilling to make payment except to an administrator appointed in Louisiana. To obviate this difficulty Richard Marr prevailed upon Robert H. Marr, the defendant in this case, to take out letters of administration in his own name, solely, as it appears, for the purpose of collecting the notes of Lonsdale. This was effected by

Succession of Marr.

Robert H. Marr as administrator of the ancillary succession. About this time Richard Marr was sued in New Orleans as indorser of notes to the amount of \$20,000 with interest. Robert H. Marr was retained by Richard Marr as his attorney to defend the several suits brought against him on these notes. The defense, after protracted litigation, was successful, and Richard Marr was released from his obligation as indorser. No formal account was ever presented by the Louisiana administrator. As attorney of Richard Marr in the heavy suits brought against him in New Orleans, R. H. Marr thought himself entitled to a fee of \$2000. He had received on the Lonsdale notes \$3052. He paid Richard Marr as administrator \$700, which left a balance of \$2352 in his hands. This balance R. H. Marr retained to cover costs of administration and fees due him by Richard Marr, leaving him to account as principal administrator for the cash payment made to him of \$700, and for the balance applied to his individual debt. At that time Richard Marr was in possession of a large amount of property and deemed to be a man of large fortune. He was administrator of his father's estate, and under the will of the decedent the bulk of his estate was devised to Richard Marr. Under this aspect of things the Louisiana administrator rested securely in the belief that no further action was necessary on his part and rendered no account. He testifies that during the war that soon followed these proceedings, his books and papers passed from under his control. That in 1866 his desk, in which many of his valuable papers were deposited, was returned to him, but that many of his books and papers were lost, and have never been recovered. Hence he is unable to produce any written evidence of the manner or basis of settlement with any of the parties in interest in these transactions. It turns out, however, that the grounds upon which he predicated his proceedings with Richard Marr were wholly fallacious. Richard Marr proved insolvent, the will of his father was annulled, and he had been removed as administrator of his estate before he put the Lonsdale notes for collection into the hands of R. H. Marr.

Three of the four heirs of G. W. L. Marr have brought this suit to compel R. H. Marr, in his capacity of administrator, to file his account, to produce his bank book showing the separate bank account of the succession, if any such account he has kept, and to pay to each of them \$3450, with twenty per cent. per annum interest for failing to make a separate deposit in bank of the funds of the succession, and that he be condemned to pay ten per cent. interest per annum from fourth February, 1861, for failing to render an account. The court below rendered judgment against the defendant in favor of each of the plaintiffs for the sum of \$406, less the sum of \$50, paid to Mrs. Toler, one of the plaintiffs, and to be deducted from her share. From this judgment the plaintiffs appeal.

In the year 1861 John Marr, one of the heirs, and representing the other two plaintiffs, came to New Orleans and received from R. H. Marr \$1318 95 on account of his collection of the Lonsdale notes. This is established by John Marr, one of the plaintiffs, who testified that the receipt originally given by R. H. Marr to Richard Marr for the notes of Lonsdale, and upon which was indorsed this payment of \$1318 95, is lost. At the time of this payment to John Marr, R. H. Marr retained \$700 paid to Richard Marr as administrator, and also his portion of the proceeds of Lonsdale's notes for the fee due him as his attorney individually. He subsequently paid Mrs. Toler \$50. The \$700 paid to Richard Marr the Louisiana administrator must lose, as having paid it improvidently to a person not authorized to receive it. \$103 80 were allowed him as commissions. This added to the \$1378 95, and the sum deducted from \$3052, the proceeds of the Lonsdale notes, leaves \$1624 25, as ascertained by the judge *a quo*, for distribution between the plaintiffs.

We think the judgment correct. Under the peculiar circumstances of this case, there being no creditors of the succession in Louisiana, and the administrator in this State, having acted in good faith, we do not think the spirit and purpose of the strongest law invoked by the plaintiff require that its provisions should be enforced in this case.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

No. 3366.—STATE OF LOUISIANA *v.* WARDENS OF THE ST. LOUIS CATHEDRAL.

Article 114 of the constitution directs that every law shall express its object or objects in its title. The title of the act No. 68, of 1870, is silent on the question of the extension of the jurisdiction of the Third District of the parish of Orleans.

Section 57 of this act, which gives jurisdiction to the Third District Court of the parish of Orleans in tax suits, is therefore unconstitutional and void.

APPEAL from the Third District Court, parish of Orleans. *Emerson, J. S. Belden and J. P. Hornor*, for plaintiff and appellee. *Charles F. Claiborne*, for defendants and appellants.

LUDELING, C. J. The plaintiff is seeking to enforce the collection of taxes for the year 1869, alleged to be due by the defendants, who filed several exceptions. We deem it necessary to notice only one of them, that is the want of jurisdiction in the Third District Court of the parish of Orleans to try the cause, *ratione materiæ*. Under the constitution the jurisdiction of that court is limited to appeals from justices of the peace. Art. 83 Constitution. It is contended by the plaintiff that this jurisdiction was enlarged by act No. 68, approved sixteenth March, 1870. But the defendants contend that the provision of that

act which attempts to confer jurisdiction upon the Third District Court is unconstitutional, because the objects of the law are not stated in its title.

We think the objection well founded. Article 114 of the Constitution declares that "every law shall express its object or objects in its title."

The title of the law in question is "An act to provide a revenue, to levy and collect taxes, to grant and collect licenses, to provide for the creation, appointment and removal of revenue officers, and to define their duties; to punish certain crimes and misdemeanors, and to create lien and mortgages in favor of the State in certain cases; to regulate the manner of the payment of moneys from the treasury."

Nothing in this title indicates that the jurisdiction of the Third District Court was extended. Section 57 of the act No. 68 of the General Assembly of 1870 is therefore clearly unconstitutional, null and void.

It is therefore ordered and adjudged that the judgment of the court *a qua* be set aside, and it is further decreed that the suit be dismissed.

No. 2352.—F. W. IRVINE & Co. v. R. H. SHORT & Co.

Checks on a bank which have been loaned to a third party, can not be enforced against such third party by the drawer thereof if it be shown that they were paid by the bank in Confederate treasury notes, on deposit in the bank to the credit of the drawer of the checks.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Breaux & Fenner*, for plaintiffs and appellees. *Semmes & Mott*, for defendants and appellants.

LUDELING, C. J. The plaintiffs allege that on the first day of April, 1862, they loaned to defendants \$500, and on the second day of April, 1862, they loaned them \$2000, which sums have never been repaid, although amicably demanded. They further aver that "said loans were made in checks upon the Merchants' Bank" of New Orleans, "which checks were collected by and for account of R. H. Short & Co., and that they were not collectable in Confederate money."

The defense is substantially that the checks were drawn against Confederate treasury notes, and that they were paid in said currency.

We think the evidence fully sustains the defense. The plaintiff Irvine in his testimony says: "I called at the office of R. H. Short & Co., telling him I was leaving some bills to be paid, and I proposed lending him some money out of which these bills were to be paid, and upon which I gave him a check on the Merchants' Bank for \$2000." Again he says, "the same time giving him a check for \$500 on the Merchants' Bank of this city, telling him he would receive instructions from John C. Bailey to invest the same in sugar." In the event he did

not, to pass the amount to my credit." Again he says: "The first check of \$500 was intended as a loan on my part to R. H. Short & Co., in the event that Bailey did not direct him to purchase sugar. The amount of the bills which I expected might have to be paid out of the \$2000 check did not exceed \$300; the balance I expected to stand to my credit on the books of R. H. Short & Co. as a loan."

Valloft, a witness, testifies that he was a clerk in the employ of plaintiffs "nearly the whole time they were here in business. I was the clerk up to the time F. W. Irvine left the city. I did all the collecting and depositing for the house, with the exception of the first and second deposits, which I believe were made by Mr. Irvine himself. The deposits were all made in the Merchants' Bank. * * * The currency received by me was Confederate treasury notes, and I deposited in the Merchants' Bank the same currency I received." * * He further says: "At the time I was clerk and collector for plaintiffs, the currency circulated and used in the city was Confederate treasury notes."

The proof in the record leaves no doubt that the checks were drawn against Confederate treasury notes, and were paid in the same currency.

Under the well settled jurisprudence of this State the plaintiffs' demand cannot be enforced by us.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment in favor of the defendants rejecting plaintiffs' demand, with costs in both courts.

No. 2326.—JOSEPH BARRERE v. LOUIS BARTET.

The city of New Orleans has absolute and plenary control of the disposition of the markets of the city. The purchaser of a stall from the farmer of a market is not bound in warranty to his vendee in case of eviction or disturbance by the city itself.

An action in damages will not therefore lie against the vendor of a stall in the market in case the vendee has been disturbed by the city.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Sambola & Ducros*, for plaintiff and appellee. *E. Filleul* and *A. Cazabat*, for defendant and appellant.

HOWELL, J. The plaintiff avers that in March, 1867, he purchased from the defendant the right of use, occupancy and enjoyment of two butcher's stalls in the St. Mary's market, in New Orleans, at the price of \$900, and with the express condition that the defendant, who was then occupying a small stall adjoining one of those sold, should not sell beef at said stall; but that in violation of said agreement he has continued to sell beef at said stall to the great injury of plaintiff; that in violation of his obligations in warranty defendant obtained, in

Barrere v. Bartet.

October, 1863, the passage of a resolution by the Common Council of the city of New Orleans authorizing the closing of a passage or empty space between the stalls of plaintiff and defendant, and afterwards caused said passage to be closed, thereby evicting plaintiff from the possession of one of his stalls and seriously diminishing the value and enjoyment of the other, and he prays that the said sale be annulled and defendant condemned to refund the price (\$900) and pay damages to the amount of \$600.

The defense is a general denial, with the averment that the said market belongs to the city of New Orleans, which controls the same as it pleases.

Judgment was rendered in favor of plaintiff dissolving the sale, ordering defendant to take back the two stalls sold, restore the price (\$900) and pay \$300 damages, from which defendant appealed.

Several witnesses testify that the defendant made the stipulation not to sell beef on the stand occupied by him, but he states as a witness that such a condition was not suggested until after the sale was completed, and he did not consent to it, but continued his business without interruption. Be this as it may, we apprehend that after plaintiff's silence from March, 1867, to January, 1869, he can not successfully urge this, if true, as a cause for annulling the sale and recovering damages without showing a clear right in law and fact to such a recourse upon defendant. The serious ground of complaint seems to be the closing of the passage or empty space between the stalls of the respective parties, by which the joint use or occupancy of the two stalls of plaintiff was made inconvenient. The property of the market is in the city, and the right to collect the daily revenues or rent, fixed by the city, of the various stalls and stands from the occupants is sold at public auction, the purchaser being called the "farmer" or lessee of the market, whose consent is necessary for the occupancy of every stall, and who has the right to dispossess any occupant upon failure for one day to pay the dues. The size, dimensions and number of the stalls, and the general management of the markets, are under the control of the city, one regulation being "that the 'farmer' shall return to the city the stands, stalls, and other appurtenances thereto belonging, in the same good order and condition as when received."

In September, 1868, the "farmer" and the defendant applied to the City Council for the privilege of closing the empty space in question, which, after a reference of the matter to the surveyor, was granted. A remonstrance was presented to the Council by the plaintiff, but the action of the Council remained unchanged, leaving the matter to the farmer upon the recommendation of a committee, to whom the subject was referred. After the passage was closed both plaintiff and defendant insisted upon using the addition, and the dispute between them

was decided by the city surveyor, the proper officer, in favor of the defendant, whereupon this suit was originated.

We are unable to see any legal responsibility on the part of defendant towards plaintiff for any damage which may have resulted to the latter by this change in the condition of these stalls. The defendant had no such property in them when he made the sale as to make him liable for any change affecting their use or convenience, even though he may have petitioned for such a change. It is a matter for the city to regulate in behalf of the public interests. It does not appear to us that the lessees or occupants of the stalls are the warrantors of the possession or profits of those to whom they may sell their own rights to the occupancy of the stalls. They of course warrant against their own acts which may interfere with the enjoyment of what they sell. But the act complained of here was the act of a public authority, for which defendant was not responsible. The City Council was not bound to authorize the change because defendant petitioned for it, nor do we see anything in the relation between defendant as vendor and plaintiff as vendee of what was really sold in this instance inconsistent with defendant's legal right to join with the "farmer of the market" in making the petition for the change. The plaintiff's tenure is only from day to day, conditioned on his punctual payment of the daily dues to the farmer, and not dependent in any degree on the warranty of the defendant, and the city, so far as the rights of the plaintiff and defendant are concerned, can make any change deemed necessary, or even close the market, provided the use for any day paid for by these parties is not molested.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendant with costs in both courts.

Rehearing refused.

No. 2327.—C. F. BERENS v. J. MARISTANY, JR., et al.

In an action for the recovery of rent the burden falls on the lessee of showing that the notary who drew the lease made an error in computing the rent

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. E. Bermudez*, for plaintiff and appellee. *Hornor & Benedict*, for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment against them for the rent of the building No. 202 New Levee street.

The defense is that the notary committed an error in drawing the contract of lease; that the price of rent was \$35 per month, and not \$90 as stated in the act; that in the same act the defendant Maristany rented Nos. 198, 200 and 202 New Levee street from James Hill, from whom the plaintiff derived title; that the real intention and contract

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was that for rent of the three buildings he was to pay \$125 per month, the price of rent of buildings No. 198 and No. 200 being at \$90 per month, and the building No. 202 at \$35 per month.

Referring to the act of lease we find that James Hill, the former owner, leased to the defendant, J. Maristany, Jr., the three buildings as stated for the term of two years, "the condition of this lease being that said purchaser shall pay for No. 202 the monthly rent of \$90 to him the said Hill, and for Nos. 198 and 200 the said purchaser shall pay the sheriff the monthly rent of \$35, and when said building shall return to the possession of said Hill out of the custody of the sheriff, then for the term of two years from such date the purchaser hereby agrees to pay the monthly rent of \$125, with the privilege of releasing the same at the same rate for two years more," etc. It appears that Hill, the lessor, never recovered the possession of the two buildings, as was anticipated. The defendants, however, were permitted by the sheriff to occupy them. After long detention in the hands of the sheriff, the premises Nos. 198 and 200 were sold under execution against said Hill. It also appears that building No. 202 was subsequently purchased by the plaintiff, in satisfaction of his judgment against the said Hill.

Subsequent to the contract of lease, the lessor, Hill, and the lessee, Maristany, entered into an agreement in writing, which private act was offered by the defendants in evidence. This instrument states in substance that it is well understood that should the sheriff demand an increase of rent for Nos. 198 and 200, said increase is to be deducted from the rent agreed to be paid for the premises known as No. 202 New Levee street; and should he remove the lessee from possession of said buildings, then the latter was to be held no longer liable for rent of No. 202, nor would he be required to hold possession thereof.

This accounts for the defendants paying the sheriff rent at \$90 per month for premises Nos. 198 and 200, instead of the amount stated in the lease. They had the consent of the lessor to pay such extra price as the sheriff might require for rent of these two buildings, and the excess to be deducted from the price agreed to be paid for building No. 202. Besides, this private act must have been drawn in reference to the precise amounts stated in the lease to be paid to the sheriff for Nos. 198 and 200, and to be paid to the lessor for No. 202. Now, if the notary made a mistake and reversed the amounts to be paid the sheriff and the lessor respectively, why did not the parties correct this error when they subsequently drew the private act? Indeed, from the evidence we are satisfied that the notary made no mistake.

We see no error in the judgment.

Judgment affirmed.

Rehearing refused.

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No. 3495.—FREDERICK HONOLD v. CITY OF NEW ORLEANS.

The acts of 1853 and 1855, re-enacted in section 3344 of the Revised Statutes of 1870, "which prohibits the levying any tax by any municipal corporation in the State on persons engaged in selling articles of their own manufacture, manufactured within the State," is not repealed or modified by the charter of the city of New Orleans enacted in 1870.

The doctrine announced in *City of New Orleans v. Lusse & Rhulman*, 21 An. 1, is reaffirmed by this decision.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Leovy & Monroe*, for plaintiff and appellant. *George S. Lacey*, City Attorney, for defendant.

LUDELING, C. J. The city of New Orleans having imposed a license tax on the plaintiff as a manufacturer of soap the latter enjoined the city from enforcing the collection of that tax, on the ground that he is exempt from such taxation by virtue of the act of twenty-fifth April, 1853, re-enacted in 1855 and again in 1870. It declares that "it shall not be lawful, hereafter, for any municipal corporation within the State to lay any tax on persons engaged in selling articles of their own manufacture, manufactured within the State." Acts of 1853, 135, No. 163; acts of 1855, 326, and section 3344, 648, Revised Statutes of 1870.

The counsel for the city of New Orleans contends that this law is repealed by the charter of the city enacted in 1870, because the exemption under that law is contrary to, or irreconcilable with, the provisions of the said charter.

And he further contends that the exemption law relied upon is unconstitutional, because in opposition to article 118 of the Constitution, which gives the General Assembly power to exempt from taxation only property "actually used for church, school or charitable purposes."

Both these questions have been decided by this court. In *City of New Orleans v. Mascaro*, 11 An. 733, it was contended that this protection to domestic manufactures had been removed by the provisions of the charter of 1856, section 102 of which is as follows: "That the city of New Orleans shall have power to levy taxes, commonly known as licenses, upon trades, professions, callings and other business carried on," etc.

The court held, in that case, that there was no repeal of the former statute by the charter; that there was nothing in the two acts which could not be made to harmonize. The same opinion was expressed in *Lusse v. Rhulman*, reported in 21 An. 1.

The counsel for the city does not question the correctness of those decisions, but he insists that section 12 of the charter adopted in 1870 conferred upon the city greater powers than the section 102 of the charter of 1856. Section 12 of the charter of 1870 bestows upon the Council the power "to levy, impose and collect a license tax upon all

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persons pursuing *any* trade, profession or calling, and to provide for its collection." Section 102 of the charter of 1856 authorized the Council "to levy taxes, commonly known as licenses, upon trades, professions, callings and other business carried on," etc.

We think the powers granted under these sections substantially the same. Section 12 of the charter of 1870 can, and therefore it must, be made to harmonize with the statute exempting manufacturers from a license tax. The repeal of laws by implication is not favored. 5 An. 122.

It is difficult to believe that the General Assembly intended to repeal section 3344 of the Revised Statutes of 1870 by the charter of the city, which was enacted by it only two days after the re-enactment of said law. C. C. arts. 17, 18, 22. Article 118 of the Constitution does not command that all occupations, trades and callings shall be taxed; but that all persons pursuing a profession, trade or calling which is taxed must be taxed equally. There is no conflict between the opinions in the cases of *Lusse & Rhulman*, 21 An. 1, and the insurance company cases recently decided, 23 An. 449, and we reaffirm the opinion expressed in the case of *City of New Orleans v. Lusse & Rhulman*.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 2394.—COMMERCIAL BANK OF KENTUCKY v. EDWARD NALLE & CO.

From and after the commencement of hostilities between the United States and the so-called Confederate States, all intercourse, trade and business was prohibited between the inhabitants of the two sections of the country. An indorsement of a promissory note, made by a resident of the so-called Confederacy, on a promissory note held by a citizen residing in one of the adhering States during the late war, was therefore void and not binding on the indorser.

If the consideration of an obligation be shown to be Confederate treasury notes, its payment can not be enforced by the courts of Louisiana. Constitution, article 127.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Hart & Roberts*, for plaintiff and appellant. *Race, Foster & E. T. Merrick*, for defendants and appellees.

WYLY, J. The plaintiff appeals from the judgment rejecting its demand against the defendants, who were sued as indorsers of a promissory note.

The defense is the illegality of the contract or indorsement, because at the time it was made at New Orleans, in 1862, all intercourse was prohibited between them and the plaintiff, the former being domiciled in Kentucky and the latter in Louisiana. The defendants also pleaded that the consideration for said indorsement was Confederate money.

Both defenses are established beyond doubt by the evidence in the record.

Judgment affirmed.

The Southern Dry Dock Company v. Steamship Wm. Tabor and Owners.

No. 2395.—THE SOUTHERN DRY DOCK COMPANY v. STEAMSHIP WM. TABOR AND OWNERS.

The burden falls on the defendant who sets up a claim in reconvention in damages caused by the plaintiff, who has failed to fulfill his contract within the time specified, of showing that he caused him, the plaintiff, to be put in default.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. B. Egan*, for plaintiff and appellee. *J. Ad. Kozier and Randolph, Singleton & Browne*, for defendants and appellants.

TALIAFERRO, J. This suit is brought by the plaintiff for charges against the steamship William Tabor, incurred for docking the vessel and for labor and materials furnished in making repairs upon her.

The defendants plead the general denial, and allege that on or about the fifteenth of March, 1866, they entered into an agreement with plaintiff to take said vessel into their dry dock in order to dock and repair her; that plaintiffs did commence the repairs on the fifteenth of March, but in consequence of the insufficiency of the dock and want of skill in those having the management of it, the defendants were compelled to wait eighty-one days for the repairs the plaintiffs had agreed to make, the dock having given way and caused delay in repairing it. The defendants on this ground set up a claim for \$12,150 in reconvention as damages sustained by them from being deprived of the use of their vessel.

The plaintiff had judgment for \$5017 46, with interest, and the defendants appealed.

We think the defendants have failed to establish the making of such a contract as they allege in their answer. They do not seem to have set up objections to the correctness of the bill furnished, and it appears to be established by the evidence. The testimony of the plaintiff is to the effect that the captain of the ship applied to have her docked, and asked for nothing more; that the docking of a vessel is considered a contract of itself, the purpose of docking being in part to ascertain the nature and extent of the work necessary to be done, and until this is ascertained, no contract can properly be entered into regarding repairs. In some instances it happens that no repairs are made. From the nature of the business the contract for repairs is a separate contract from that of docking. The delay complained of seems to have been submitted to without objection. There does not appear to have been a contract by which the plaintiffs were bound to perform any given quantity of work within any specified time, and there seems to have been no putting them in default by a demand on the part of the defendants to finish the work.

The case was referred, unnecessarily, we think, to experts, and the amount of testimony taken without any satisfactory result makes up a

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very large and confused record. The report of the experts we think irrelevant. They disagreed in their estimates, and the umpire awarded the plaintiffs about \$3000. An exception was filed to the introduction of the reports of the several experts on numerous grounds, which it is unnecessary to examine. 1 An. 332.

We think the judgment of the lower court does justice between the parties, and it is therefore ordered, adjudged and decreed that the same be affirmed with costs

Rehearing refused.

No. 2370.—ISAAC KLEIN, for the use, etc., v. CRESCENT CITY RAILROAD COMPANY.

28	729
104	201

To enable a party to recover damages from a street railroad company for injuries inflicted by the car, while in motion, by running over and wounding a child, it must be shown affirmatively that the accident occurred through the fault or negligence of the driver.

APPEAL from the Seventh District Court, parish of Orleans.
Collens, J. Cotton & Levy, for plaintiff and appellee. *T. Gilmore* and *Percy Roberts*, for defendant and appellant.

This case was tried by a jury in the court below.

HOWELL, J. In this case, Isaac Klein, in behalf of his minor child, Herman, claims from the Crescent City Railroad Company the sum of forty thousand dollars damages caused to said child by the carelessness of the said company and its employe, the driver of a car, by which the child was run over, resulting in much suffering and the loss of a leg.

A verdict for five thousand five hundred dollars was rendered, and from the judgment thereon the defendant appealed.

It is shown that the child was run over a few feet below the lower foot-crossing of Seventh and Chippewa streets as the car was descending the latter street. A moment before the accident occurred, this child, then about six and a half years old, was sitting on the steps of his father's residence, situated on the right hand corner of said streets, the steps being a little below the said crossing. He suddenly sprung from his seat and attempted to cross the street immediately in front of the mule, which was moving at an ordinary trot, came in contact with the animal, fell and was run over by one of the wheels of the car on the opposite side from that on which he was just before seated. The driver swears that he did not see the child until he was on the ground, just under or between the fore legs of the mule, when he instantly put down the "brakes" and pulled on his reins, but the animal was so much frightened that he could not stop the headway of the car in time to prevent the injury, the mule giving two or three jumps or plunges

Klein, for the use, etc., v. Crescent City Railroad Company.

forward and toward the left, jerking the front wheels of the car off the track, one of the wheels passing over the child's leg during this time.

From these facts it seems to us the driver was not guilty of such negligence as to throw upon the company the responsibility for the damage sustained by the child. Its effort to cross the street at an unusual point, so closely in front of the mule, which, it is shown, was traveling at the ordinary gait, was so sudden and rapid that the driver had not time to avoid the collision had he expected its probable occurrence, and the collision so startled the mule that the momentum of the car was increased so as to pass it beyond the place of the contact where the child fell before the animal could be stopped.

It is therefore ordered that the verdict of the jury and the judgment of the court *a qua* be set aside and there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

Wyly, J., absent.

No. 2832.—STATE, ex rel. WILLIAM DURBRIDGE, v. F. J. PRATT,
President, et al.

The act of the General Assembly, approved March 19, 1870, entitled "an act to establish an additional district court for the parish of Orleans to define the jurisdiction thereof, and to recognize and determine the jurisdiction of the existing seven district courts for the parish of Orleans," vested in the Eighth District Court, created by the act, exclusive jurisdiction over all cases of injunction, mandamus, etc. The other district courts of the parish of Orleans were therefore divested of all jurisdiction over such cases from and after the passage of the act. The fact that a judge for said Eighth District Court was not appointed and commissioned until some time thereafter, did not continue the jurisdiction over such cases as the act vested exclusively in the Eighth District Court until a judge was appointed and qualified therefor.

A judgment rendered by the Sixth District Court for the parish of Orleans, after the passage of the act creating the Eighth District of the parish of Orleans, is therefore null and void, because the court was without jurisdiction.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. T. A. Bartlette*, for plaintiff and appellee. *Joseph Hornor*, for defendants and appellants.

HOWELL, J. The president of the Crescent City Live Stock Landing and Slaughterhouse Company has appealed from a judgment making peremptory a writ of mandamus ordering him, in his official capacity, to issue to the relator certificates of over a thousand shares of stock in said company.

The first question is one of jurisdiction. On the nineteenth March, 1870, the defendants moved to transfer this case to the Eighth District Court for the parish of Orleans, under the provisions of "an act to establish an additional district court for the parish of Orleans, to define the jurisdiction thereof, and to recognize and determine the

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jurisdiction of the existing seven district courts for the parish of Orleans," approved March 16, 1870, and promulgated March 17, 1870, by which the said Eighth District Court was vested with the exclusive jurisdiction of this class of cases, and all such as were then pending in the other courts were ordered to be transferred thereto. One clause of section four reads as follows: "Immediately upon the passage of this act it shall be the duty of the judges of the Fourth, Fifth, Sixth and Seventh District Courts for the parish of Orleans to transfer to the Eighth District Court for the parish of Orleans all suits or proceedings the jurisdiction over which is by this law vested in said Eighth District Court. The said Fourth, Fifth, Sixth and Seventh District Courts are divested of all jurisdiction over such cases, except for the purpose of entering an order of transfer, and the said Eighth District Court shall be and is hereby vested with power to hear and determine suits or proceedings so to be transferred as if the same had been originally brought in said Eighth District Court." The motion was refused, and on the same day the judgment was rendered, from which this appeal is taken.

It is urged that at the date of this motion the Eighth District Court was not organized, the judge thereof not having been commissioned and qualified until the twenty-fourth of March, 1870, and the court not opened until the twenty-sixth of the same month, and that under the provisions of article 83 of the Constitution the Sixth District Court could not be divested of jurisdiction of this cause until another court was "provided."

In the case of the State, ex rel. Pontchartrain Railroad Company, v. the Judge of the Seventh District Court for the parish of Orleans, we had occasion to inquire into the power of the Legislature to create the Eighth District Court and regulate its jurisdiction and that of the other seven courts of the parish, and the effect of this law upon the cases then pending in said courts and ordered to be transferred; and we expressed the opinion that the judges of said courts had been divested of all jurisdiction over such cases, except to render an order of transfer according to the plain language of the act. All such suits pending in said courts at the time the law was passed were to be immediately transferred to the Eighth District Court, established by the said law. There was no hiatus in the judicial power as contended by the counsel for the relator, as the law provided a jurisdiction for the cases over which the previously existing courts were divested of jurisdiction. The delay necessary for appointing a judge to preside in the court created did not operate a suspension of or hiatus in the judicial power which existed in the court by the passage of the law creating it, any more than the death or resignation of a judge would have such effect. The Legislature having the power to enact the law, the moment

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it became a law its provisions became operative and binding on the judges named, who were by express terms divested of all power to try any cases which were ordered to be transferred. The power of the judge of the Sixth District Court to hear and decide this case was taken away and conferred on the judge of the Eighth Court, and the only action he could take was to enter an order transferring the cause, which he should have done. All else that he has done is "*coram non judice*."

It is therefore ordered that the judgment appealed from herein be reversed and set aside, and that this case be remanded to the court *a qua*, with instructions to the judge thereof to transfer the same to the Eighth District Court for the parish of Orleans, the relator and appellee to pay costs of appeal.

No. 2428.—HENRY PEYCHAUD, Liquidator, etc., v. J. B. HOOD.

Any agreement made between the officers and the stockholders of an insurance company as to the liability of the stockholders on their stock notes can not affect creditors.

A person who has been regularly appointed liquidator of an insurance company, has the legal right to sue for and stand in judgment in cases where the company are seeking to enforce payment of the stock notes held by the company.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & P. Robert*, for plaintiff and appellee. *Gibson & Austin*, for defendant and appellant.

LUDELING, C. J. This suit is instituted by the liquidator of the Great Southern and Western Life, Accident, Marine and Fire Insurance Company to recover from the defendant nine hundred dollars, being an assessment of twenty per centum on the unpaid portion of his stock note, in order to meet the liabilities of the company. For answer the defendant admits that he subscribed to the stock referred to in plaintiff's petition, but he avers there was a distinct and positive understanding between himself and the president of the company that he was not to be held in any manner liable for the amount of his subscription; that the said president only wanted his influence in the company; and it was agreed that he should not incur liability on the same. He further avers that the note was not to be used and that it has not been legally transferred, and that plaintiff has no right, title or interest in it; and that the note was given without consideration. An amended answer was subsequently filed, alleging that when defendant "became a stockholder in the company of which the plaintiff herein is liquidator, he was in error as to the amendment to said charter, and that said amendment has caused the release of stockholders of the capital stock of said company and caused in a great manner the insolvency of the company." And he further avers that

 Peychaud v. Hood.

the amendment was not concurred in by all the stockholders, of which fact he was ignorant at the time he subscribed for the stock, and that "being uninformed and ignorant of the effect of said amendment at the time of his subscription, he subscribed through error," and, therefore, he claims to be released.

The agreement between stockholders and the officers of the company as to the liability of the stockholders on their stock notes, can not affect creditors. Stockholders are liable for contributions on their unpaid stock. 10 R. 440.

The plaintiff is admitted to be the liquidator of the company; as such he had authority to bring this suit. 5 An. 740; 2 R. 573; *Cucullu v. The Union Insurance Company*.

The amendments of the charter so as to authorize the company to change its name and to take fire and marine risks, seem to have been regularly made, and the new name of the company clearly indicated this change. The defendant became a stockholder long after the charter had been amended. There is no merit in the defense set up.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

No. 2980.—THE STATE OF LOUISIANA *v.* The Heirs of ZACHARY WHITE.

23 733
46 008

The prescription of five years applies as well to promissory notes given in favor of the State as to those in favor of private parties. See *Graham, Auditor, v. G. W. & J. T. Tigner et al.*, ante page 570.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Simeon Belden*, Attorney General, for the State. *Woolbridge & Thomas*, for defendants and appellees.

TALIAFERRO, J. The plaintiff sues on a promissory note for the sum of \$1207 29 with interest. The note bears date sixteenth July, 1853, and is made payable two years after date, at the office of the Auditor of Public Accounts, to the State Treasurer.

The defense is prescription. Judgment was for defendants, and plaintiff appealed.

It is clear that the note, upon its face, is prescribed, but the question raised is, does prescription run against the State? In the case of *J. Graham, Auditor, v. G. W. & J. T. Tignor et al.*, decided by this court at its late term at Monroe, suit was brought on promissory notes of the same character of that sued on in the present case. The question was there decided in the affirmative.

For the reasons assigned in that case, it is ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs. See 23 An. p. 570.

No. 2515.—Succession of WILLIAM S. STEELE.

The value of improvements placed upon community property after its dissolution can not be taken into account in the settlement of the succession. In such a case its actual value, or what it will sell for, is to be taken as the basis of the account without reference to the original cost or the cost of any improvements made upon it.

If the separate estate of either the husband or the wife has been increased or improved during the marriage, the other spouse or his or her heirs shall be entitled to the reward of the one-half of the value of the increase or amelioration, provided it be shown that such increase or amelioration was the result of common labor, expense or industry. But if it be shown that such increase or amelioration was owing to the ordinary course of things, or the rise in the value of property, then and in such case there shall be no reward. R. C. C. 2408.

If by testamentary disposition the wife has been appointed testamentary executrix and given the usufruct of the whole estate of her husband, she may, on the application of the heirs or the legatees, be required to give security.

A PPEAL from the Parish Court of Jefferson. *Breuning*, Parish Judge. *N. Commandeur* and *R. King Cutler*, for appellant. *Hy. Dugue*, for appellee.

HOWELL, J. This controversy involves oppositions to two accounts, original and supplemental, filed by the testamentary executrix, and the rights of certain legatees under the provisions of the will of deceased.

The original account contains a statement of the real estate of the community, inventoried at \$2500, and movables inventoried at \$46, and of the separate property of the deceased, consisting, first, of the proceeds of property expropriated to the city of New Orleans amounting to \$2500, from which is deducted amount of vouchers one and two (\$108 66), leaving \$2391 34 net, and second, proceeds of Magnolia street property belonging to the decedent before, and improved and sold after marriage for \$4000, one-fourth cash, balance in three notes of \$1000 each, from which is deducted cost of improvements and expenses as per vouchers three to ten (\$2547 35), leaving \$1452 65 net, making the separate assets amount to \$3843 99; from this are deducted \$1800, amount of two mortgage notes executed by the deceased before and paid after marriage, as per vouchers eleven and twelve, \$530 funeral expenses, as per vouchers thirteen to fifteen, \$439 10, judicial charges, as per vouchers sixteen to eighteen, and \$100 for probable additional costs, leaving \$974 89 as separate funds, but entered or described in the account as due by the community to the succession. The executrix then credits herself with \$1000, brought in marriage by her, and \$202 bills paid by her as per vouchers nineteen to twenty-three, from which she deducts the rents of community property collected by her, \$273, less \$90, paid for repairs, as per voucher twenty-four, leaving a balance in her favor of \$1019, to the extinguishment of which she applies the above balance of \$974 89, leaving a deficit of \$44 11 to be paid her out of the community before dividing it between herself and the heirs, and she claims the full ownership of the one-half of the remaining community property as surviving widow and the

Succession of Steele.

usufruct of the other half under the will. The supplemental account simply consists of items of taxes and insurance paid by her as per vouchers twenty-five to thirty-five, and increasing the amount due her from \$44 11 to \$233 21.

The father and brothers of the decedent, named as legatees, oppose both accounts as incorrect in this, that to the community property should be added \$800 for a house erected thereon, and several articles specially described and valued at \$283, and to the separate property a watch and chain worth \$125; that the sum of \$700 due by Mr. and Mrs. Bremer, and \$500 due by Mr. and Mrs. Heffernan, are omitted; that nothing is due to the widow, and the sums shown by the various vouchers, except numbers one, two, sixteen, seventeen and eighteen are unfounded in law or charged to the wrong estate, and the father asks to be put in possession of one-third of the succession bequeathed to him, and the brothers ask that the widow furnish bonds as usufructuary of the residue. The appraisers and parish recorder oppose, claiming their fees, which are admitted. The parish judge rendered judgment allowing the fees of the appraisers and recorder out of the sum reserved for costs, increasing the amount in favor of the widow to \$483 21, to be paid out of the community property, thus absorbing all the separate property of the husband, recognizing her as owner of one-half of the community property, and entitled to the usufruct of the other half thereof under the will, as not exceeding the disposable portion, and homologating the account as thus amended at the costs of the heirs, who have appealed.

The record contains a large mass of irregular, confused unnecessary proceedings, and irrelevant, conflicting evidence, out of which it is difficult, if not impossible, to ascertain and adjust the rights of the parties, and we have given the foregoing analysis of the accounts and judgment, which we can neither sustain nor amend, in order that our views of the law applicable to the issues involved may be understood in the construction of another and more correct account.

The demand that the value of a house, erected on the community property, should be added to the account can not prevail, as the property existing in kind must be accounted for at its actual value, or what it may sell for, without reference to the original cost or the cost of any additions. As to the several articles, which it is alleged should be accounted for, the evidence shows that some belonged to the widow and others were disposed of by the husband prior to his death. The proof shows that Dennis Heffernan owes the succession \$400, not embraced in either inventory or account. His acknowledgment of this indebtedness is conclusive against him in favor of the succession, and is one of its assets to be accounted for. The amount due by F. W. Bremer is shown to be due to the widow in her own right. Vouchers

one and two are admitted as properly deducted from the sum received from the city for the expropriation of the Clara street (separate) property, the amount of which was \$2300, instead of \$2500, as put down in the account, and the deduction as above makes the balance \$2191 34. The vouchers three to ten purport to be for the cost of improvements put on the Magnolia street (separate) property during the marriage. It was purchased and, from the evidence, paid for prior to the marriage, and is stated by the agent of the legatees and heirs to have been then (December, 1859,) worth \$1200, and was sold in 1867, just before the decease, for \$4000, and the widow contends that the value thereof was enhanced to the extent of the cost of the improvements as per above vouchers, amounting to over \$2500, leaving the separate interest of the succession therein about \$1400. The rule on this subject is found in article 2403 R. C. C., which reads: "when the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry, but there shall be no reward due if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property or to the chances of trade." The mode of ascertaining this augmentation is announced in the case of *Babin v. Nolan*, 4 R. 278; 6 R. 508; 8 R. 181; 10 R. 373, and approved in 12 R. 385; 2 An. 30; 3 An. 611, and 6 An. 634. It is, to estimate the property according to its value at the time of the dissolution of the community, but, if possible, in the situation in which it was at the time of the marriage, and then its real value with all the improvements thereon in the condition in which it was at the time of the dissolution of the community, and the difference between the two estimations will form the increase, for one-half of which the surviving spouse should be compensated in the settlement of the community, according to the article above quoted. As the property in this case did not exist in kind at the dissolution of the community, and the husband had received one-fourth of its proceeds prior to his death, and the widow acknowledges possession of two of the three notes given for the balance of the price, this price must be taken as one of the estimations and the other estimation must be of it, in its condition at the time of the marriage; that is, ascertain its value at the time of the sale by the deceased in the condition in which it was at the date of the marriage, and the *difference* between this estimation and the sum for which it was sold will be the increase, for one-half of which the widow is to be compensated, and the balance of the said price, consisting of the whole of the first estimation and half of the difference between it and the whole price, will belong to the succession.

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Voucher eleven, objected to, is a note for \$1000 made by the husband before, but paid after, marriage, and in the absence of proof is presumed to have been paid with community funds, and is a charge in favor of the community against the succession. Voucher twelve is a note for \$800 paid prior to marriage, and should not appear in the account. Vouchers thirteen and fourteen are objected to only as charges against the succession. They are funeral charges, incurred after death, and are debts of the succession. R. C. C. Voucher fifteen is a receipt for \$400, cost of building a tomb, after the decease, and is not allowable out of the means of the estate, as it forms no part of the funeral expenses and should not be in the account. See 19 L. 426. Vouchers sixteen, seventeen and eighteen are not opposed. Vouchers nineteen to twenty-three are physicians' and druggists' bills, some before and some during the last illness of the deceased, and there being no contest as to privilege, are allowable as debts of the community. Voucher twenty-four is for repairs to the community property after the decease and was properly deducted from the rents. Vouchers twenty-five and twenty-six are for taxes on community property paid prior to the death of the husband and can have no place on the account, the revenues or use of the property meeting all such expenditures. Vouchers twenty-seven to thirty-five, except No. 33, are for taxes and insurance subsequent to the decease, and their disposal is dependent on the question of usufruct, to which we will come presently. Voucher thirty-three is a notarial bill paid during the marriage and should not be in the account. There is no express opposition to the item of \$1000 cash brought into marriage by the wife, but evidence has been introduced sufficient to establish its correctness. The opposition to the fees of counsel is waived.

The will is in the following words: "I do hereby make and constitute my beloved wife, Barbara Grau, to be my sole executrix, giving her hereby full seizin and detainer of all my estate. In case my father, now in Ireland, should survive me, I will and bequeath to him the portion of my estate to which he shall be entitled by the laws of Louisiana. I will and bequeath to my said wife surviving me, and in case she should not again marry, the usufruct of all the estate and property I may die possessed of, to be by her enjoyed during her natural life, and at her death or in case of her marriage again, I make and constitute my said father, James Steele, and in case of his decease anterior to hers, then to my brothers, Hugh Steele, John Steele and Harper Steele and Robert Steele, or the survivors, to be by them equally enjoyed and the property divided between them as my residuary legatees; hereby revoking all former wills and codicils by me heretofore made, holding these presents alone valid."

Though somewhat obscurely drawn, we must construe the foregoing

to give to the father, who was alive at the date of the testator's death, one-third of the latter's estate and the usufruct of the balance to the wife during her life or widowhood, and then the property, which is subject to the usufruct, to pass to the father or his brothers as named in the will.

After the payment of the debts, one-third of the succession, consisting of all the separate property of the husband and one-half of the community property, must be delivered to the father and the other two-thirds to be held in usufruct by the widow under the will. In making this partition the father must bear his proportion of the taxes and insurance on the property partitioned accruing since the death of the testator.

To sum up. The account should set forth the community property and funds; the separate property or estate of the deceased, less one-half of the increased value thereof caused by improvements made by the community; the community debts to be paid out of the community funds, and the charges against the succession or separate estate proper of the deceased to be paid out of said succession or estate, and the partition made as above stated, the widow to furnish security to be fixed by the judge below; and for this purpose

It is ordered that the judgment appealed from be reversed and this cause remanded to the lower court, and the executrix required to file an account in accordance with the foregoing views and the necessary proceedings had in accordance with law; costs of appeal to be paid by the widow and appellee.

No. 2425.—WALLACE & CO. v. J. J. MARION.

An action to enforce the payment of a debt can not be defeated by a peremptory exception, that the action should be one for the settlement of a partnership, unless it be shown affirmatively that a partnership exists.

A defense in reconvention founded on an agreement that the defendant was to have five per cent. on the amount of the net profits of the establishment as a salary as clerk in the store can not be enforced until the debts due it are collected.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Grant & Fellowes*, for plaintiffs and appellees. *Koontz & Elliott*, for defendant and appellant.

HOWELL, J. Plaintiffs claim the sum of \$490 62 as cash loaned to the defendant, who pleads a reconventional demand for a balance due him in the net profits of the house of Wallace & Co. under an agreement between the parties. He also filed what he terms a peremptory exception that this suit should be for a settlement of partnership. This exception was properly overruled, as the written agreement between the parties declared that no partnership existed or was established between them.

The sum claimed is the amount drawn by defendant in excess of the amount which was guaranteed to him as a salary under the agreement. According to this agreement, defendant was to receive as a salary five per cent. on the net profits, which per cent. was guaranteed to make a specified amount. The profits were to be ascertained by taking an account of the stock at the expiration of the term of employment, but the debts due the firm at the time, in which the defendant is interested, shall be collected in ordinary course by the firm, and not estimated with the stock.

It is shown that at the date of the trial of this suit in the court below, debts to a large amount were uncollected, and that the sum received by defendant exceeded the guaranteed amount of the net profits by the sum claimed, and that five per cent. on the profits as shown by the stock and sales would not make the sum guaranteed. By the terms of the agreement, defendant is not entitled to five per cent. on the outstanding debts until they are collected, and hence if he has drawn or received a greater sum than was due him at the expiration of his term of service, he can be made to return the excess. *Non constat* that these debts will ever be collected. He must, under his agreement, wait until enough is collected to make the five per cent. thereon equal the sum guaranteed, and then he may demand five per cent. on all sums thereafter collected. Upon this principle the judgment in favor of plaintiffs is correct.

Judgment affirmed.

No. 3336.—FRITZ HUPPENBAUER v. LOUIS DURLIN.

23 739
45 734

If the appeal has been taken and filed in the appellate court, notwithstanding it has been dismissed by the judge *a quo*, on the ground that the surety on the bond is not good, then and in such case the appeal will be dismissed on motion for want of a bond.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Winck & Huft*, for plaintiff and appellant. *Rogers & Blanc*, for defendant and appellee.

LUDELING, C. J. A motion to dismiss the appeal has been made on the following among other grounds, to wit: That the appeal was dismissed by the district judge because a sufficient bond had not been given.

The record shows that an order for a suspensive appeal was granted and the amount of a bond for same was fixed. A bond was executed, but on a rule to show cause why the appeal should not be dismissed and an execution issue, on account of the worthlessness of the security, the district judge adjudged the security not good, and dismissed the appeal. We must dismiss the appeal for want of a bond.

It is therefore ordered that the appeal be dismissed, at appellant's costs.

Rehearing refused.

No. 2777.—CITY OF NEW ORLEANS v. J. M. HOYLE et als.

Conceding that the act of 1818 conferred upon the city of New Orleans the monopoly of keeping powder magazines in the State of Louisiana, yet that act has been so modified by subsequent acts of the General Assembly as to confer the same authority on other corporations of the State; and is to that extent repealed, and the monopoly is thereby revoked.

Therefore, since the passage of acts subsequent to the act of 1818, which confer on other corporations of the State the right to keep powder magazines, the city of New Orleans can not maintain an injunction against any person who may be keeping a powder magazine in any other part of the State, nor can the city maintain an action in damages against such person.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. George S. Lacey*, City Attorney, for appellee. *Hays & New*, for defendants and appellants.

LUDELING, C. J. The city of New Orleans, alleging that she had the exclusive right to keep powder magazines in the State of Louisiana, avers that the defendants have infringed this right and damaged her to the amount of \$10,000, for which she prays judgment, and she obtained an injunction to restrain them from infringing upon said exclusive right in the future.

There was judgment in favor of the city for \$500, and perpetuating the injunction; and the defendants have appealed.

The plaintiff relies upon the act of the Legislature, passed in 1818, to establish her *exclusive right* to keep powder magazines within the borders of the State of Louisiana.

We do not deem it necessary to decide whether that act created a monopoly in favor of the city in the State of Louisiana or not, because by subsequent acts of the Legislature the power to keep powder magazines has been conferred upon other municipal corporations in the State, and to that extent the act of 1818 would be repealed, if in conflict with the later laws enacted by the Legislature.

The fourth section of the act entitled "An act to organize and define the authority, duties and functions of the police jury of the parish of Jefferson," passed in 1834, declares "that the said police jury is hereby vested with full power and authority to order and make such rules and regulations as they may deem expedient and proper for regulating the police of powder magazines." And the eighteenth section of the same act declares "that all laws or parts of laws contrary to the provisions of this act be and the same are hereby repealed so far as relates to the parish of Jefferson." In 1839 the Legislature passed an act entitled "An act relative to the police jury and to the roads and levees in the parish of St. Bernard," etc., which contains provisions similar to those above quoted. The act of 1840, entitled "An act to create a separate police jury for that part of the parish of Orleans situated on the right bank of the Mississippi," conferred upon said police jury "the same powers" and subjected it to the "same

duties as the police juries of other parishes of the State." We are therefore of opinion that even if the act of 1818 conferred the exclusive right of keeping powder magazines to the city of New Orleans, this monopoly has been revoked.

As the Legislature has the power to abolish the charter of the city, it can not be seriously doubted that it could revoke a part of the powers or privileges conferred upon the municipal corporation.

We do not deem it necessary to decide whether or not a municipal corporation can exercise police powers beyond its corporate limits.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed; that the injunction be set aside, and that the plaintiff's demands be rejected, with costs of both courts.

No. 2329.—Succession of ISABELLA GRANT—J. A. PEEL v. DAVID GRANT, Administrator.

The administrator, in answer to a suit to enjoin the sale of property inventoried as belonging to the succession, may allege and show the simulated character of the plaintiff's title. If, however, it be shown on trial that the plaintiff's title was fraudulent, but not simulated, then, and in that case, the administrator could only have its nullity pronounced by direct action.

APPEAL from the Second District Court, parish of Orleans. *Durignaud, J. Hornor & Benedict* and *G. L. Hall*, for plaintiff and appellant. *T. A. Bartlette*, for defendant and appellee.

TALIAFERRO, J. The defendant having received the appointment of administrator of the estate of his deceased daughter, Isabella Grant, and caused an inventory of her succession to be taken, the plaintiff, who alleged that he was the owner of the property inventoried and claimed to have possession of it, sued out an injunction to restrain the administrator from interfering with it, and prayed in his petition that he have judgment recognizing his ownership and that the injunction be perpetuated.

The administrator answered by a special denial of the alleged ownership of the plaintiff and charged that if any sale of the property was ever made to him by the decedent, as pretended by plaintiff, the same was without consideration and gotten up through fraud by the plaintiff and one Kidder, then in the employ of the deceased, who was in a dying condition and in the immediate prospect of death. He prayed that the plaintiff's demand be rejected and for general relief, etc.

The defendant had judgment in his favor, and the plaintiff appealed.

An exception was taken to the ruling of the court below, refusing to strike out that part of the defendant's answer which alleges fraud in the sale from Isabella Grant to John A. Peel, and averments having in view an annulment of the sale, and to the admission of evidence

to sustain these allegations, on the ground that the defendant in injunction could only attack the validity of the sale by a revocatory action. The plaintiff relies upon the case of *Zuberbier v. Dryfus*, 21 An. 271, in which the sale of personal property was made by notarial act and accompanied by actual delivery. It was found in that case that the sale was real and the court decided that, although fraudulent, it could not be indirectly attacked. In this case we think there are many of the indicia usually found in simulated contracts. The delivery of the property to Peel is not clearly established. The witnesses Meyne, Clarke and Leeffe, clerks of Henning, the grocer, living quite near the Waverly House, and from whose grocery supplies of provisions were furnished the boarding house, say that the business of Miss Grant with the grocery continued to the time of her death and was carried on in her name, and that Kidder was attending to the business for her up to the time of her death; Clarke says he understood so both from Kidder and Miss Grant.

Mazureau, the notary who made the inventory, testifies that upon presenting the order he held for making the inventory of Miss Grant's property at the Waverly House, Kidder remarked that the deceased had not been properly named, that she was his wife. He showed the effects to be inventoried and they were entered upon the inventory as belonging to the succession of Isabella Grant. To this Kidder made no objection. The notary further stated that Kidder did not name a third party as owner of the property; that he claimed it as his own, saying that David Grant, the father of Isabella Grant, had nothing to do with it.

The evidence discloses that Isabella Grant, an unmarried woman, having no descendants, had for a considerable time previous kept the boarding house known as the Waverly House, in Camp, at the corner of Poydras street; that she had long been laboring under a pulmonary disease and for a month or two previous to her decease was prostrate, and most, if not all, that time so enfeebled that she was incapable, physically, to attend to business; that Kidder attended to the business of the house for her; that about thirty-six hours before her death Kidder married her. A written instrument purporting to be a sale of the furniture of the Waverly House to Peel by Miss Grant was shown, and also a transfer by her to Peel of her lien of the premises. The sale is dated October 27, 1868, and the transfer of the lease December 7 of the same year. Miss Grant died on the twentieth of the same month and year. A showing is made of the payment of money by Peel as the price of the purchase, and he states that he then went into possession and constituted Kidder his agent to carry on the business. Under cross-examination his answers show that he took but little or no interest in the business of the Waverly House and appears to have

 Succession of Isabella Grant.

known very little about it. Miss Grant, after the sale, went to stay a short time at the house of a Mrs. Brown, on Bacchus street, but returned to the Waverly House, where she remained until her death. Kidder, by his own statement, could not safely own property, as he was much in debt at the time, and afterwards took the benefit of the bankrupt law.

David Grant, the father of Isabella Grant, was a forced heir of his daughter, and these impediments, it would appear, were in the way of a donation by Miss Grant of all her property to the man she married almost in her dying moments. Under such circumstances the interposition of a fraud would readily suggest itself. Peel, it is shown, is a merchant of large business, who was in the habit of boarding at the Waverly House at times, when his family were absent from the city. He was well acquainted with Miss Grant and with Kidder. The indifference he appears to have manifested in the affairs of the Waverly House after his purchase, shows that he felt no great interest in the acquisition.

A full review of the evidence in this case induces us to conclude that there was no real and actual sale, and that the pretended sale was a mere simulation gotten up for the benefit of Kidder and to deprive the plaintiff from obtaining the succession of his daughter.

The exception was properly overruled and the judgment correctly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

No. 3039.—THE LOUISIANA STATE LOTTERY COMPANY v. A. RICHOUX
et al

23	743
109	600

If a law has been regularly promulgated according to the forms of the constitution, its invalidity will not be examined or passed upon by the judiciary on alleged irregularities or informalities committed by the General Assembly in passing it, nor will parol evidence be received to show that the General Assembly have not complied with the requirements of the constitution in passing it.

An act of the General Assembly will not be declared void because its objects are not set forth in its title, if the title discloses the objects of the act in terms so clear that no one can be misled thereby.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J.*
Joseph P. Hornor, for plaintiffs and appellees. *George L. Bright*,
for defendant and appellant.

TALIAFERRO, J. This is an action brought by the plaintiffs against the defendant Richoux and several other parties to restrain them by injunction from vending lottery tickets of the Havana and other lotteries, in violation of the exclusive right claimed by the plaintiffs to establish lotteries and to sell lottery tickets in this State. A rule nisi

was granted by the judge *a quo*, which was afterwards made peremptory. From this judgment McCarthy, one of the defendants, alone has appealed.

Various grounds are set up in defense; two of them, however, seem to be chiefly relied upon. To these we will direct our attention. They are:

First—That in the passage by the Legislature of the bill which plaintiffs found their exclusive privilege upon, as the law securing their alleged right, the requirements of article 42 of the State Constitution were not complied with, and the act of the Legislature purporting to confer the privilege is therefore null and void.

Second—That the title of the act does not, as required by article 114 of the Constitution, express the objects of the law intended to be enacted.

Article 42 of the State constitution provides that “no bill shall have the force of a law until on three several days it be read in each house of the General Assembly, and free discussion allowed thereon, unless four-fifths of the house where the bill is pending may deem it expedient to dispense with the rule.”

When a legislative act is duly promulgated according to the constitution and laws under which it is passed, we find no authority in the judiciary department to look behind it and determine its validity or invalidity from the proceedings of the General Assembly in adopting it. Such a course, it would seem, is not sustainable on the theory of the independent and separate action of the three branches of the State government. When a legislative act is attacked on the ground that it contains provisions that are unconstitutional, the question of its validity is properly within the scope of judicial action. The courts have power when a constitutional question is raised to examine whether the thing ordered, permitted or forbidden to be done, may have effect under the sanction of the Constitution. The question should be, is the law itself constitutional as to its provisions and what it declares, and not whether it is constitutional as to the manner of its enactment or the proceedings by which it was enacted?

Courts will presume that the constitutional rules laid down for the passage of laws have been complied with by the law maker, and when duly promulgated will accept them without inquiry as to the observance or non-observance of the required rules and forms in the preparation and passage of bills. The opposite doctrine, we apprehend, would lead to a very confused and perplexing state of affairs in the administration of laws. If courts can examine the regularity of the proceedings had in the passage of bills, what is to prohibit them from determining whether any other constitutional provision, merely ancillary to the exercise by the General Assembly of the appropriate function of law

making, has been properly exercised? Conflicting views on this question have been taken by the courts of several of the States of the Union, and we do not regard it as definitely settled by their decisions.

The title of the act incorporating the Louisiana Lottery Company reads thus: "An act to increase the revenues of the State, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force." This title, it is contended, does not fulfill the requirements of article 114 of the Constitution, which declares that "every law shall express its object or objects in its title." The interpretation which seems to be given to the title in question is that the act purports simply to *authorize* the incorporation and establishment of a State lottery company; whereas by the act itself the lottery company is established, a fact which the reader of the title is not apprised of. This interpretation then assumes that, as indicated by the title, the object of the Legislature was to authorize itself to incorporate and establish the lottery company—a thing absurd upon its face. How a person could be misled by the title into the supposition that the act does not incorporate and establish a lottery company, we do not easily perceive. True, a more distinct definition of the objects of the act might have been given, but that fact is of no importance if its objects are by the title made sufficiently apparent. Legislators are not always philologists, and their terms and expressions are not to be disregarded if, as it not unfrequently happens, they are not so clearly definite and distinct as they might be made. We think the title fulfills the conditions of the article 114 of the Constitution.

It is, for the reasons stated, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs

Howe, J., *concurring*. The only question in this case which seems important is that raised by a bill of exceptions to the refusal of the judge *a quo* to permit parol evidence that the provisions of article 42 of the Constitution in reference to the reading of bills had not been complied with.

It appears that the law in question was approved August 17, 1868, and that the approved and adopted journals of the Legislature show that the provisions of article 42 were strictly complied with in its passage. More than two years afterward, the defendant being proceeded against under the law, attempts to show by parol testimony that the rules were not properly suspended; that the legislative record is incorrect; that the law is without force.

If he could do this at the end of two years, he could do it at the end of twenty. If he could do it, any other defendant could do it, and

this without regard to the lapse of years; and every criminal might consume the time of the court and money of the State in attempts to prove by parol, in contradiction of the legislative journals and the statute book, that the law under which he was being prosecuted, promulgated perhaps forty years before, was null and void by reason of informalities prior to its passage. The same could be done respecting laws affecting rights of person and property, and regulating inheritance and obligations, and the whole system of legislation on which the safety of society rests could be attacked and shattered by verbal testimony. It seems impossible that such proof can be consistent with law and public policy. See *Green v. Weller*, 32 Miss. 650; *Pacific Railroad v. The Governor*, 23 Missouri, 353; *People v. Dulin*, 33 N. Y. 269.

I can see no reason why the judgment should not be affirmed.

HOWELL, J. *dissenting*. I am not prepared to concur in the opinion of the majority of the court maintaining the constitutionality of the act of the legislature by which, it is claimed, the Louisiana State Lottery Company was incorporated. Its title does not, in my opinion, conform to the one hundred and fourteenth article of the Constitution. I express no opinion upon other points presented.

23	747
Case 1	
118	183

No. 3591.—JOHN LOCKWOOD v. JAMES E. ZUNTZ.

An appeal from the verdict of a jury and the judgment thereon will be dismissed on motion if the note of evidence shows that no documents were filed in evidence nor testimony in writing on the trial, and statement of facts or assignment of errors are found in the record.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. John H. Ilsley*, for plaintiff and appellant. *Cotton & Levy and W. O. Denegre*, for defendant and appellee.

HOWE, J. The judgment in this case was rendered by default, the damages being assessed by a jury.

The certificate of the clerk of the court *a qua* shows that the record contains a full, true and correct transcript of all the proceedings had, but that no documents were filed in evidence, or testimony reduced to writing on the trial. There is no bill of exceptions, no assignment of errors, nor any statement of facts. The motion to dismiss must prevail. It would be a vain thing to keep a case pending in this court when it is clear that under no circumstances could the court grant any relief to the appellant. 21 An. 458; 16 An. 98; 11 An. 644.

Appeal dismissed.

Rehearing refused.

Merz v. Labuzan & Carter.

No. 2378.—GEORGE MERZ v. LABUZAN & CARTER.

A promise to pay the debt of a third person can not be proved by parol testimony. R. S. p. 284, § 1443.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. E. Howard McCaleb*, for plaintiff and appellee. *J. McConnell, and Rogers & Blanc*, for defendants and appellants.

LUDELING, C. J. The only question necessary to be decided in this case is whether or not a promise to pay the debt of another can be proved by parol evidence, although it has been received without objection?

The act of 1858, entitled "An act to require written proof in certain cases," declares "that hereafter parol evidence shall not be received to prove any promise to pay the debt of a third person, but in all such cases the promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact." Acts of 1858, No. 208. We do not see how courts can give effect to parol proof of a promise to pay the debt of a third person without disregarding the plain provisions of that law. "Parol evidence shall not be received," etc. Being a prohibitory law, whatever is done in contravention of its provisions are null. C. C., art. 12.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment against the plaintiff, as in case of nonsuit, with costs of both courts

No. 2294.—I. BLOOM & Co. v. L. H. STERN & Co.

A note of a commercial firm given by one of its members in settlement of a liability of the firm, as surety or guarantor, is binding on the firm if it be shown that the firm have recognized the acts of the member in contracting the liability and in making the note.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Race, Foster & E. T. Merrick*, for plaintiffs and appellants. *Cotton & Levy*, for defendants and appellees.

LUDELING, C. J. This is a suit on a promissory note for \$1000, drawn on the second of May, 1867, payable twelve months after date, to the order of the plaintiffs, and signed L. H. Stern & Co.

The evidence shows that L. H. Stern introduced to the house of I. Bloom & Co. one H. D. Doherty, and induced the latter firm to sell him goods by assuring them that the firm of L. H. Stern & Co. would be responsible.

Doherty failing to pay, the plaintiffs called on L. H. Stern, one of the members of L. H. Stern & Co., for payment. He induced plaintiffs to execute their two drafts on Doherty, their debtor, in favor of L. H. Stern & Co., to facilitate the collection of the debt by L. H. Stern &

23	747
45	1426

23	747
Case 1	
125	251

 Bloom & Co. v. Stern & Co.

Co., who undertook the collection. These drafts, though accepted by Doherty, were never paid.

L. H. Stern & Co., through L. H. Stern, then compromised with plaintiffs by agreeing to execute their note in favor of the plaintiffs for \$1000. It is this note which forms the subject of this suit.

We think the evidence clearly shows that L. H. Stern & Co. are bound for the amount of this note. In another record, which is also before us, it appears that L. H. Stern & Co. have sued I. Bloom & Co. on the drafts given to facilitate the collection of the debt from Doherty, thus showing the firm recognized the acts of L. H. Stern.

It is therefore ordered and adjudged that the judgment of the district court be avoided, and that there be judgment in favor of I. Bloom & Co. against the defendants *in solido* for the sum of \$1000, with five per centum per annum interest thereon from judicial demand, and costs of both courts.

Rehearing refused.

No. 1072.—A. T. STEWART & Co. v. BLOOM, KOHN & Co.

If a case has been taken from the Supreme Court of Louisiana to the Supreme Court of the United States on a writ of error from a final decree, and the decree of the State court is reversed on the plea of prescription, and the cause is remanded by the Supreme Court of the United States to the State court, then and in that case the Supreme Court of the State will make order and decree in the case to conform to the ruling of the Supreme Court of the United States on the plea of prescription.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Elmore & King*, for plaintiffs and appellants on writ of error. *Race, Foster & E. T. Merrick* and *E. W. Huntington*, for defendants.

LUDELING, C. J. This is an action upon a promissory note. The defendants pleaded the prescription of five years.

The note fell due on the thirteenth March, 1861, and the citations were served on the defendants on the eighteenth day of April, 1866.

More than five years having elapsed, after the maturity of the note, before the citations were served on the defendants, the plea of prescription must be sustained. C. C. 3494, 3505; *Rabel v. Pourciau*, 20 An. 131, and *Smith v. Stewart*, 21 An.

It is therefore adjudged and decreed that the judgment of the lower court be affirmed, and that the appellants pay the costs of the appeal.

Decision after the Case was Remanded by the Supreme Court of the United States to the Supreme Court of the State.

WYLY, J. In conformity to the decree of the Supreme Court of the United States, to which court this case was removed on writ of error,

Stewart & Co. v. Bloom, Kohn & Co.

it is ordered that the judgment of this court, heretofore rendered herein, be set aside, and it is now ordered that the exception of prescription be overruled.

ON THE MERITS.

From the evidence the case is clearly made out for the plaintiffs, as far as the amount of the note, to wit: \$3226 24. As to the account, its correctness is not satisfactorily established by the evidence.

It is therefore ordered that the judgment appealed from be annulled, and that the plaintiffs recover judgment against the defendants *in solido* for \$3226 24, with five per cent. interest thereon from thirteenth March, 1861, and costs of both courts.

No. 3402.—URBAN THEURER v. BERNARD NAUTRE and CHARLES W. BRADBURY.

23	749
47	1408
23	749
49	125

Machinery set in bricks and run by steam, and used as a cotton seed oil factory, constitutes a part of the realty on which it is erected. Such machinery can not, therefore, be removed from the premises after the land on which it stands has been seized under a mortgage.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. O. E. Schmidt*, for plaintiff and appellee. *Armand Pitot*, for defendants and appellants.

WYLY, J. The defendant Nautré has appealed from a judgment on a rule requiring him to return to the seized premises the boiler, engine and gearing illegally removed by him, and to restore the same to the condition in which it was prior to the illegal removal, or in default of so doing, requiring him to pay to the sheriff the value of the machinery so removed, to wit: \$700, to be applied to the partial satisfaction of the writ of seizure and sale obtained by the plaintiff against two lots of ground and buildings on Julia street, to which the said machinery was attached at the time the said premises were seized.

It appears that the mortgage under which the property was seized was granted by the defendants to the plaintiff on the twenty-seventh of February, 1868, to secure a loan of \$12,500; and there were on the premises at the time three buildings, two of which were used as a cotton seed oil factory, and contained machinery run by steam. It also appears that the boiler and engine, removed by the defendant Nautré since the proceeding herein to foreclose the mortgage, were set in brick work which was torn up in the said removal.

We think the district judge decided the case correctly. The machinery attached to the premises formed part of the immovable itself, and ought not to have been removed by the defendant Nautré. C. C. 455, 460; 12 An. 227.

It is therefore ordered that the judgment herein be affirmed, with costs.

No. 2368.—MASTER AND WARDENS OF NEW ORLEANS v. ROBERT W. FOSTER et als.

The act creating the master and wardens of the city of New Orleans, does not prohibit any merchant or body of merchants from employing any other person to examine and survey damaged goods in cases where they were interested. An injunction will not, therefore, lie against any person thus employed, nor can the master and wardens recover damages from the merchants who have employed such person, nor from the person employed.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. M. A. Dooley*, for plaintiffs and appellees. *Leovy & Monroe*, for defendants and appellants.

LUDELING, C. J. The plaintiffs allege that they are the Master and Wardens of the port of New Orleans, and that as such they have "the exclusive right to discharge the duties and perform the acts prescribed by law for them officially to perform, and that as such officers they have the legal and exclusive right to the fees and emoluments prescribed by law for the performance of such official acts and duties," and they "complain that Robert W. Foster, Arthur C. Waugh, George A. Fosdick, John M. Witherspoon, William F. Halsey, William Creevy, Theodore Nickerson, Charles W. Fox, R. H. Harris and H. Bidwell, in September, 1868, illegally, wantonly and maliciously conspired and confederated together to injure and disturb petitioners in the rightful enjoyment and legal discharge of the duties of their said offices, and to divest, oust and deprive them of the legal fees and emoluments which belong and appertain to them as such officers." That "in furtherance of their said illegal conspiracy," they procured, instigated and encouraged, and have so continued ever since said date, and still continue to instigate, assist and encourage the said Robert W. Foster to usurp and assume the powers, duties and authority legally and exclusively belonging and appertaining to petitioners by virtue of their said offices as aforesaid, and that said Foster, so instigated, assisted and encouraged as aforesaid, usurped and assumed and still continues to usurp and assume the powers, authority and duties belonging to petitioners," etc. And they aver further that said Foster threatens to continue, and they fear he will continue, his said illegal acts. They therefore pray for an injunction against all the defendants to restrain them "from in any manner usurping, assuming or exercising any of the functions or doing any of the acts appertaining to said offices of petitioners," etc., and for fifty thousand dollars damages.

The evidence shows that the defendants have entered into a contract whereby the said Foster was employed to examine and survey damaged goods in cases where they were interested, and that the said Foster does not pretend to act under any commission or by virtue of any public office, but simply as the employe of the merchants and under-

writers who may engage his services, and that he has not molested or interfered in any manner with plaintiffs.

We know of no law which prevents the defendants from entering into such a contract as the above, and we think the plaintiffs have wholly failed to show any right of action.

The grave constitutional questions discussed in the briefs and arguments of counsel need not be passed upon in order to decide this case, and courts of justice will avoid deciding upon the constitutionality of laws unless the decision be indispensably necessary for the determination of the cause.

It is therefore ordered that the judgment of the district court be avoided, and that there be judgment in favor of defendants dissolving the injunction and rejecting plaintiffs' demand, with costs of both courts.

Rehearing refused.

No. 2325.—E. W. BURBANK v. J. M. TAYLOR & SON.—JAMES A. WRIGHT, Intervenor.

23	751
48	703

Intervention is not the remedy for a third party who claims the ownership of property that has been released from seizure by a bond given by the defendant. In such a case the property should be pursued in the hands of the defendant.

A proceeding *in rem* can only be maintained where a privilege is shown to exist on the property seized.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hornor & Benedict*, for appellant. *D. F. Mitchell*, for appellees. *E. D. Craig*, for intervenor.

LUDELING, C. J. The plaintiff, alleging that the defendants, residents of the parish of Jefferson, are indebted to him in the sum of \$11,884 56, and that \$4,367 thereof were for advances and supplies made to defendants in the year 1866, claims a privilege on thirty-five bales of cotton as a part of said crop, and sequestered the same in the parish of Orleans.

The defendants bonded the cotton, and subsequently J. A. Wright intervened and claimed to be the owner of the cotton.

After the cotton had been released on bond, Wright could not intervene to claim *the cotton*. He should have pursued the cotton in defendants' possession. 1 R. 277; *Beal v. Alexander*, 14 An. 52, 53; 17 An. 314; 18 An. 58; *Dorr v. Kershaw*.

The evidence fails to establish the right of the plaintiff to a privilege, and as the proceeding is *in rem*, and not against the defendants personally, who do not reside in the parish where the suit was brought, the plaintiff's demand must be rejected.

It is therefore ordered that the judgment of the District Court be affirmed, with costs of appeal.

Rehearing refused.

No. 2905.—A. F. WILD v. C. L. FERGUSON.—WILLIAM S. MUDGETT, Intervenor.

The salary of a State officer can not be seized and sold for debt, nor can a garnishment process issue directing the State Auditor to warrant in favor of a seizing creditor of an officer of the State for the amount of salary due him.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. George H. Penn*, for plaintiff and appellant. *H. M. Dibble*, for intervenor, appellee.

TALIAFERRO, J. The plaintiff, a judgment creditor of the defendant, took out garnishment process against James Graham, State Auditor, to seize the right of his debtor in an appropriation made by the Legislature thirty-first March, 1870, for the relief of George A. Fosdick, C. L. Ferguson, William Baker and others. The Auditor answered: "I have been furnished by the Secretary of State with a certified copy of an act entitled 'an act for the relief of G. A. Fosdick, C. L. Ferguson, William Baker and others,' approved May 31, 1870, by which is appropriated to said C. L. Ferguson the sum of \$535. Said sum still remains to the credit of said Ferguson. I have still, under the provisions of said act, the said sum of \$535, for which a warrant might be issued for the benefit of said Ferguson or for his account."

The act of the Legislature referred to recites that the appropriation was made "for services rendered the State as members of the Board of Registration and employes thereof after the fifteenth of December, 1868, and for which the aforesaid persons have not been paid." An execution was issued and the interest and right of Ferguson in this appropriation was seized. Mudgett, alleging that he is the transferee of this claim of Ferguson, came in by injunction and third opposition and opposed the sale of it.

The plaintiff answered the opposition, averring that he had acquired all Ferguson's rights by virtue of the proceedings he had taken; that he thereby had acquired a privilege superior to any pretended right of the intervenor. Judgment was rendered in favor of the intervenor, perpetuating the injunction and declaring him owner of all the right of Ferguson in the Legislative appropriation. From this judgment the plaintiff appealed.

A certificate of transfer was shown from Ferguson to the plaintiff, dated sixth May, 1870. The plaintiff contends that this instrument is without effect as against him, because no notice of the transfer was ever given to the State, being in this case in the attitude of debtor, and cites Civil Code, article 2613. On the other hand it is urged that the compensation appropriated for Ferguson's benefit is a salary for performing the duties of a public office, and therefore not liable to seizure for debt. C. C., article 1987; C. P., article 647.

Wild v. Ferguson—Mudgett, Intervenor.

We are not satisfied that the plaintiff acquired a right to the defendant's interest under the act of the Legislature referred to, as we do not recognize the legality of garnishment process against the State. It is clear that the salary of the officer could not be seized and sold for debt.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 3161.—GEORGE S. SAWYER v. ROBERT DAVIS et al., and ROBERT DAVIS et al. v. GEORGE S. SAWYER. (Consolidated.)

The employer who has made a contract with laborers, whereby the latter are to make and gather the crop of cotton for a certain portion thereof, and the employer is compelled to engage other labor to help pick and gather the cotton, he, the employer, has a lien and privilege on that part of the cotton which may fall to the laborers to secure the reimbursement of such expense.

A PPEAL from the Thirteenth Judicial District Court, parish of Concordia. *Hough, J. George S. Sawyer*, in proper person, appellant. *G. S. Mayo*, for appellees.

TALIAFERRO, J. This is a controversy between an employer and a number of laborers engaged by him in the cultivation of a cotton plantation during the year 1869. A written contract was entered into between the plaintiff and Henry Zinco as planting partners on the one side, and about thirty laborers on the other, by which it was agreed on the part of the laborers that they would work on St. Genevieve plantation, in the parish of Concordia, in a good and faithful manner for the employer during the year 1869, in producing a crop of cotton and corn; that they would obey all orders that Sawyer and Zinco or their agent might give from time to time, put up and repair fences, and perform any work that might be required to be done; that, failing in any of these engagements, Sawyer and Zinco were to have the privilege to declare the contract void so far as any one offending was concerned. The employers were to furnish the work animals needed in the cultivation of the place, feed for the animals, the farming utensils, etc., needed on the place, furnish provisions for the laborers, and give them the one-fourth part of all the cotton and corn grown on the plantation that year.

It seems that about the first of July of the year 1869 Zinco and Sawyer dissolved partnership, the latter, as he alleges, having purchased the interest of the former in the business.

About the commencement of the picking season, or not long afterward, dissensions and difficulties arose between the parties to this contract. The employer, without the consent of the laborers employed

under the contract, engaged other laborers to pick cotton on the St. Genevieve plantation, informing the regular employes that they would be required to pay their proportional amount of the expense of these additional laborers, and he aimed to justify this act by saying that the laborers on the place failed to do their duty in the matter of picking the cotton, that they were remiss in their labor, not having worked two-thirds of the time they had contracted to work. During the month of November the first shipment of cotton was made from the plantation to New Orleans. About twenty bales were, by the direction of Mr. Sawyer, hauled out to the river bank to be shipped, when the laborers took possession of five of these bales and hauled them back to the plantation, claiming them as their share of the twenty bales. The employer thereupon took out an injunction against fifteen of the employes to restrain them from refractory and disobedient conduct relative to the business of the plantation, and from interfering with any portion of the crops raised on the plantation until a fair division of the crops or their proceeds could be made. He prays judgment annulling the contract as to them; that the one-fourth part of the crop or its proceeds be divided among all the laborers who have worked in and helped to make and gather the same, according to the time they worked, etc. The injunction was served about the twenty-second of November.

In the month of February following twenty-six of the laborers, by their counsel, prayed for and obtained a writ of provisional seizure to seize and take into the possession of the sheriff the crop or a sufficient amount thereof, if found, to satisfy their demand, and if not found, a sufficient portion of the proceeds thereof, alleging that they have by law a privilege upon the crop or its proceeds. They aver that the crop raised on the St. Genevieve plantation in the year 1869, amounted to two hundred bales or thereabout, of the average weight of four hundred pounds each; that it has been entirely removed from the plantation; that a part of it, as they have reason to believe, has been shipped to New Orleans and sold on account of G. S. Sawyer; that they have not received more than eleven bales in the whole. They pray judgment for one-fourth the amount of the crop less the eleven bales they admit they have received, and that they receive the same in kind, and failing in that, that they have judgment against their said employer for such amount as may be due them at the rate of eighty-five dollars per bale.

The two suits were consolidated and tried together. The injunction was perpetuated as to two of the laborers complained against, and dissolved as to the others. The proportional amount of cotton received by the parties respectively was fixed by the judgment at one hundred and fourteen bales by G. S. Sawyer and twenty-nine by the laborers.

Sawyer v. Davis et al., and Davis et al. v. Sawyer.

It decrees that one-fourth of the twelve hundred and forty-eight dollars paid out to the third parties for picking cotton be refunded to him by the laborers employed to make the crop; that the provisional seizure be sustained, and the privilege claimed recognized; that the cotton seized under the writ be divided by the sheriff by weight, and decreed the basis and manner of this division; that a privilege in favor of Sawyer be recognized on that portion of the cotton falling to the laborers to secure the payment to him of the one-fourth of the twelve hundred and forty eight dollars paid by him as aforesaid. The costs in both proceedings to be paid by the employer, except those the payment of which is provided for by the two parties against whom the injunction was sustained. From this judgment Sawyer, the employer, has appealed.

There is a mass of evidence in the record of a very contradictory character. It is apparent enough that neither of the contracting parties have properly complied with their obligations. There seems to have been dissatisfaction on the part of the employer on account of the manner in which the labor was performed, and distrust on the part of the laborers of the fairness and good faith of the employer. After a review of the testimony, we are not inclined to think that justice has not been done between the parties.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

No. 2278.—A. SKANNALL v. JOHN A. STEVENSON.

An agent engaged in the purchase of cotton must account to his principal for the full quantity that he has purchased.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *Clark, Bayne & Renshaw*, for defendant and appellant.

TALIAFERRO, J. On the seventeenth of June, 1865, a written contract was entered into between the plaintiff and defendant of this character: John Chaff, the duly authorized agent of Stevenson, obtained from the plaintiff one hundred and thirty-six bales of cotton, which were to be disposed of by Stevenson and the net proceeds to be equally divided between them. This suit is brought on this written agreement to enforce payment of one-half the value of the cotton, which the plaintiff alleges to be \$14,000, and he prays judgment accordingly. The answer is a general denial and defendant avers specially that he never received any cotton, the property of the plaintiff. Judgment was rendered in favor of the plaintiff for \$3233 33, with costs. The defendant has appealed.

We think it fully established that Chaff was the authorized agent of Stevenson; that in that capacity he made the agreement with Skannall for one hundred and forty bales of cotton and received one hundred and thirty-six bales; that it was shipped by Chaff from Lake Bisteneau to the mouth of Loggy bayou, on the Red river. Stevenson sets up in defense that this cotton was never received by him, or rather introduces evidence to establish that the cotton was seized under order of the Federal Government and appropriated to itself as cotton that had been sold by Skannall to the rebel government. It is true that Skannall had so disposed of his cotton, and in the agreement with Stevenson the latter specially bound himself to hold Skannall harmless and protect him against all claims of the United States in respect to it. The attempt of Stevenson to show that all this cotton was seized by the United States' agents, we think a failure. The facts in relation to it seem to be that in the month of June, very soon after the agreement was entered into between Stevenson's agent and Skannall, the cotton was shipped to the mouth of Loggy bayou, thence to be reshipped to New Orleans. This shipment from the lake to the mouth of Loggy bayou was undoubtedly made in the latter part of June. Stevenson had other cottons which he was concentrating at the same point and reshipping from thence to New Orleans. Fully a month afterwards it is shown that the government agents did seize all the cotton that Stevenson had *at that time* (twenty-eighth July) at the mouth of Loggy bayou; but we are satisfied from the evidence of Chaff that sixty-three bales of the Skannall cotton had been shipped to New Orleans and disposed of by Stevenson before this general seizure of cotton took place on the twenty-eighth of July. There was ample time for the shipment which Chaff refers to to have been made before the twenty-eighth of July. He says, speaking of the Skannall cotton: "My agent attended to the shipping of it. I also heard from the agent under my control of his receiving it at the mouth of Loggy bayou. After that the only knowledge I have is that I saw the bills of lading of sixty three bales of cotton shipped from the mouth of Loggy bayou to New Orleans. Further I know nothing but there were sixty-three bales of that cotton that I saw the bills of lading for shipped from the mouth of Loggy bayou to New Orleans. These bills of lading were produced to me by Joseph B. Hamilton." A portion of the lot of cotton obtained by Stevenson through Chaff from Skannall was probably still remaining at the mouth of Loggy bayou with other cotton under Stevenson's control awaiting shipment, and was seized by the government on the twenty-eight of July. But that prior to that time sixty-three bales of Skannall's lot were shipped off and escaped the Federal officers, we think quite clear. These sixty-three bales Stevenson does not account for satisfactorily.

Skannall v. Stevenson.

Whatever might be our view under a different state of facts in regard to the traffic between these parties in cotton having the character of that of Skannall's, we think that Stevenson having received the cotton as an agent of Skannall and, as we are satisfied, has failed to account for a part of it, he ought to be held liable. The case was tried before a jury in the lower court and they found a verdict for the amount stated. We do not feel authorized to disturb it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 3099.—ARNAUD LEBOURGEOIS v. EMMA LEBOURGEOIS, Wife of LOUIS CHENET, etc.

The vendor of a tract of land may enforce the resolatory condition against a third purchaser from his vendee. If, therefore, it appear as matter of fact that the wife has taken a tract of land as a *datien en paiement* of her judgment against her husband, which is subject to the resolatory condition because the price has not been paid, then and in such case she can not successfully resist the payment of notes and mortgage which she has placed upon it, on the grounds that the notes and mortgage were given under marital influence and to secure a debt of her husband.

APPEAL from the Fourth Judicial District Court, parish of St. James. *Beauvais, J. Alfred Roman*, for plaintiff and appellant. *Legendre & Poché*, for defendant and appellee.

Howe, J. In the early part of 1867 Arnaud LeBourgeois, Florian LeBourgeois and Emma LeBourgeois were the owners, each, of one undivided third of a plantation in the parish of St. James. On the fourth April, 1867, under a judgment against them, the property was sold by the sheriff and purchased by Louis Chenet, the husband of the defendant, Emma LeBourgeois. In settlement therefor it appeared, by the return of the sheriff, that Chenet paid the costs, the claim of the seizing creditor and sundry other claims, and the proportion of surplus going to Arnaud LeBourgeois and Florian LeBourgeois, and retained in his hands the *pro rata* of such residuum due to his wife, Emma LeBourgeois.

On the thirteenth November, 1867, a judgment of separation was rendered against Louis Chenet in favor of his wife, Emma LeBourgeois, and he was decreed to be indebted to her in the sum of \$6247 20, with certain interest. On the second December, 1867, by act of *datien en paiement*, Chenet conveyed the property to his wife, the price being fixed at \$7000, and the latter assuming a mortgage which had in the meantime been imposed by Chenet on the property in favor of a third party for \$3800.

On the twenty-first day of October, 1868, Mrs. Emma LeBourgeois, being still the owner of the plantation by the act lastly recited, appeared before the recorder, assisted by her husband, Chenet, and

Arnaud LeBourgeois v. Emma LeBourgeois.

declared in substance that her husband did not pay in cash at the sheriff's sale of April 4, 1867, the share of surplus coming to Arnaud LeBourgeois (the plaintiff at bar), but gave his note for it; that this note amounted to \$3000, principal and interest, and was still held by Arnaud. The portion of the act referred to reads as follows:

“La dite dame comparante déclare de plus, qu'en règlement et en paiement de la part ou portion revenant au dit Sieur Arnaud LeBourgeois dans le produit de la dite vente du 4 avril 1867, le dit Sieur Louis Chenet, son époux, lui avait fournie un simple billet tiré et souscrit par lui pour la dite somme de deux mille deux cent soixante-treize 27½ piastres, payables à l'ordre de M. Arnaud LeBourgeois, au bureau du recorder de cette paroisse, à vue.

“Que ce billet s'élève aujourd'hui, en capital et intérêts, à la somme de trois mille piastres; n'a pas encore été payé, et est toujours la propriété du dit Sieur Arnaud LeBourgeois.”

She then recites the separation of property and the conveyance to her of the plantation; her desire to recognize the validity of the debt and to assure its payment; and proceeds to assume the amount of it and gives her notes therefor, with the authority of her husband, which notes are accepted by the plaintiff and are those on which this suit is brought.

The answer admits the execution of the notes, but alleges that they “were executed by the defendant to represent a debt contracted by her husband during the marriage, which debt was assumed by respondent, who bound herself by means of the notes sued upon to pay the same, in direct violation of a prohibitory law, under marital influence and in ignorance of her rights.

To this defense the plaintiff, in argument, replies that a portion of the price bid by Chenet at the sale of April 4, 1867, remained unpaid; that the sale was liable to be dissolved for this non-payment; that the resolutive condition thus implied would operate against the land in the hands of the defendant and deprive her of it, unless she came forward and paid the amount herself; that in the language of this court in *Sorrell v. Cox*, 10 R. 72, “though the debt was originally contracted by the husband, it bore upon the property purchased by the wife, • • and that the debt sued on was contracted for her private benefit.”

We think the case is with the plaintiff. Chenet had not paid the price of the land and it was subject in his hands to the operation of the dissolving condition. On the principle that a man can not transfer more than he himself has, and in accordance with the rules laid down in *Jones v. Crocker*, 1 An. 440, and *Bloodworth v. Jacobs*, 12 An. 699, the land was liable in the defendant's hands to the same formidable attack. By giving the notes in suit she postponed this attack, and their payment would perfect her title as against this claim.

Arnaud LeBourgeois v. Emma LeBourgeois.

We do not understand the decision in *Spurlock v. Mawer*, 1 An. 301, to control this case.

It is therefore ordered that the judgment in favor of defendant be reversed, and that the plaintiff have judgment against the defendant, Mrs. Emma LeBourgeois, wife of Louis Chenet, for the sum of \$3000, with interest at eight per cent. per annum on \$500 from January 1, 1869; on \$1250 from September 1, 1869; and on \$1250 from September 1, 1870, until paid; and costs of suit in both courts.

Rehearing refused.

No. 2230.—NEW ORLEANS CITY RAILROAD COMPANY v. CRESCENT CITY RAILROAD COMPANY.

An injunction that has issued to restrain other parties from erecting a street railroad on a particular piece of ground, predicated on the alleged exclusive right on the part of the petitioner, will be dissolved and set aside if it be not shown that he has such exclusive right. The fact that the vendor of the petitioner had acquired the exclusive right from the city of New Orleans to build a street railroad over the neutral ground on Canal street, and afterward abandoned it, will not of itself confer the exclusive right upon a third party who may obtain permission from the city to build a road thereon.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, W. H. Hunt*, for plaintiff and appellee. *T. Gilmore*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment perpetuating the injunction sued out by the plaintiff to restrain it from building a railroad on the neutral ground on Canal street, between Magazine and Camp streets.

The grounds for the injunction are that the plaintiff has the exclusive right to said neutral ground on Canal street for its railroad by virtue of its contract with the city of New Orleans, and that the defendant is estopped from contesting this exclusive right by virtue of a compromise between the plaintiff and David McCoard, the vendor of the defendant, in which the latter renounced the right to extend his railroad over this section of the neutral ground on Canal street.

The first ground is not correct. The city of New Orleans has not granted to the plaintiff the exclusive right to the use of the neutral ground in controversy, although it gave it permission to keep a double track thereon. It is not pretended that the defendant is interfering with the track of the plaintiff. It is only endeavoring to comply with its agreement with the city of New Orleans, made under ordinance No. 478, new series, approved by the Mayor on the fourteenth October, 1867, in which the defendant was authorized and required to extend its road over said space of ground.

The plaintiff having permission to run a street car on Canal street, has no cause to complain if for public convenience a like privilege has

been given to another by the common grantor. The city undoubtedly had the right to make the grant contained in the ordinance of the fourteenth of October, 1867, and we see nothing prohibiting the defendant from accepting it, nor do we see an obligation compelling the acquired right to inure to the benefit of the plaintiff.

Grant that McCoard, from whom the defendant derived title, abandoned or sold to the plaintiff the right which he had under a contract with the city in 1865 to build or extend the road over the space of ground on Canal street, his subsequent sale to the defendant of the balance of his rights did not incapacitate the latter from receiving the grant of the fourteenth of October, 1867. It may be true that the acquisition of a better title by the vendor than the one conveyed, inures to the benefit of the vendee by virtue of the obligation of warranty implied in the contract, and it would also be true that the acts, admissions or declarations of the vendor, in matters of title, are binding on the vendee; but these principles of law have no application to the case before us.

Here the right claimed by the defendant to the use of the vacant space in dispute was not acquired from McCoard. He had previously abandoned his right to run street cars on the neutral ground on Canal street, between Magazine and Camp streets, in a compromise with the plaintiff, and the city of New Orleans, which granted McCoard the right to do so in 1865, accepted and approved the said abandonment.

Assuming, then, that there was an obligation of the character contended for between McCoard and the plaintiff, which we do not admit, that obligation has not been incurred by the defendant by virtue of the transfer which McCoard made to it on the eighth of August, 1866, of all the rights which he had to run street cars in the city of New Orleans, remaining to him after the said abandonment. The right claimed by the defendant, and which the plaintiff has enjoined from being exercised, was not derived from McCoard; but the defendant acquired it in October, 1867, from the city of New Orleans.

Now, because the defendant acquired all the railroad interests vested in McCoard on the eighth of August, 1866, did that preclude it from acquiring from another source a right which McCoard once had, but had abandoned previous to his conveyance to the defendant? As to the right in dispute, the defendant is not the vendee of McCoard, and is therefore not bound by his acts, admissions or declarations in relation thereto.

The right claimed by the defendant to run its cars upon the disputed territory was granted to it by the city of New Orleans, from whom the plaintiff also derived its privilege.

Under this state of facts, where does the obligation arise prohibiting the acquisition of the right claimed by the defendant, or if acquired,

New Orleans City Railroad Company v. Crescent City Railroad Company.

compelling it to inure to the benefit of the plaintiff? We are unable to find the origin of such an obligation in any of the sources known to the law from which legal obligations arise, and therefore we conclude that it does not exist.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that there be judgment for the defendant, the plaintiff paying costs of both courts.

No. 3445.—STATE ex rel. P. MURTAGH et als. v. THE JUDGE OF THE EIGHTH DISTRICT COURT, Parish of Orleans.

An appeal will lie from a judgment either annulling or affirming an ordinance of the City Council, if the amount involved in the ordinance by way of contract exceeds in amount the sum of five hundred dollars, notwithstanding there may be several parties to the contract on the one side, no one of whom may have an interest therein equal to five hundred dollars.

In such a case a mandamus will issue, on application, to the judge *a quo*, directing him to grant the appeal.

APPPLICATION for a Writ of Mandamus. *H. N. Ogden and J. D. Hill*, for relators. *H. C. Dibble*, Judge, respondent.

HOWELL, J. The relators, seventeen in number, allege that they, in connection with certain other parties, instituted suit in the Eighth District Court, parish of Orleans, entitled *James Ready et als. v. City of New Orleans et al.*, to annul ordinance No. 1438, new series, passed by the City Council of New Orleans, for the purpose of authorizing and instructing the controller to adjudicate the contract for shelling Locust street, from Felicity road to Washington avenue, at the sole cost and expense of the front property owners on said street, of whom the relators are a majority, and also to annul the contract made with J. J. O'Hara, a defendant in said suit, in pursuance of said ordinance; that under said contract their united liability and interest exceed five hundred dollars and the whole amount involved is over five thousand dollars; that exceptions to the right of some of the plaintiffs in said suit to an action on the ground that the amount for which each was liable was under the jurisdiction of the court *a qua*, were maintained and the suit tried as to the others, against whom reconventional demands were filed by the contractor, O'Hara, their demand dismissed and judgments rendered against them on the several reconventional demands; that they applied for an appeal and tendered the necessary bond, but the appeal was refused and executions were ordered. They pray for a writ of prohibition and mandamus.

The judge answers that he refused the appeal because "the amount in dispute between each of the several relators and the defendants in the said suit of *James Ready et als. v. New Orleans et al.* is less than five hundred dollars and (he) relies upon the authorities cited in *Hennen's Digest*, volume 1, title Appeal, page 20, 1 (A.) 3."

State ex rel. Murtagh et als. v. The Judge of the Eighth District Court.

Such a general reference to authorities is no aid to the court and would be as well omitted. We do not think the reason justifies the refusal. The object of the suit primarily is to annul an ordinance and contract involving the sum of five thousand dollars, and if it had been decided in favor of the plaintiffs therein, relators here, and against the city and O'Hara, the contractor, there is no doubt the city and O'Hara, or either of them, could have appealed, and hence, as said in the case of the State ex rel. James Graham v. Judge of the Eighth District Court, decided at the last term in Monroe, the other party is entitled to the like right. The amount for which each of the relators may or may not be liable under the contract is not the principal or primary matter in dispute, but is a consequence of the principal question—the validity of the ordinance and contract, and is directly presented only by the reconventional demands. It can not, therefore, control the right of appeal in the case.

It is therefore ordered that the mandamus issued herein be made peremptory.

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No. 3499.—STATE ex rel. E. K. WASHINGTON v. THE CLERK OF THE SIXTH DISTRICT COURT OF THE PARISH OF ORLEANS.

The clerk of the District Court can not be permitted to coerce a settlement of his costs by holding on to the transcript of appeal. In case, therefore, that the clerk refuses to deliver the transcript to the appellant, on the ground that his costs therefor have not been paid, a mandamus will issue to the clerk on application of the appellant directing him to deliver the record, and pay the costs of the writ. 22 An. 563, 578.

APPPLICATION for Writ of Mandamus. *E. K. Washington*, for relators. *William Woelper*, Clerk of the Sixth District Court, respondent.

Howe, J. The relator, who was plaintiff in the court below, took an appeal and gave an appeal bond. The clerk of the court *a qua* refused to deliver to him the transcript unless sundry fees were first paid, and the relator therefore asks for a mandamus.

The answer of the respondent contains no matter of defense. In the case of the State v. The Clerk of the Second District Court, 22 An. 585, where, as in this case, the relator was plaintiff in the lower court, it was decided that "the appeal bond having been given according to law, the clerk should have delivered the transcript to the appellant." The same ruling had theretofore been made in cases where a defendant was appellant. 22 An. 503, 563, 578.

It may therefore be regarded as settled that the clerk of the lower court can not coerce a settlement of his disputes with parties in regard to costs by withholding the transcript of appeal. C. P. 585.

It is therefore ordered that the mandamus issued herein be made peremptory at respondent's costs.

Emmer v. Mrs. James Kelly.

No. 3279.—WILLIAM EMMER v. MRS. JAMES KELLY.

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In an action of partition commenced by the heirs, one citation addressed to the surviving wife in her individual capacity and as natural tutrix of her minor children is sufficient. In such a case there is not such a conflict of interest as requires the interposition of the under tutor.

The tutor or tutrix is the proper party to invoke a family meeting for the purpose of deliberating on the question of a judicial partition where minors are interested.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. McGloin & Kleinpeter*, for appellant. *Randolph, Singleton & Browne*, for appellee.

TALIAFERRO, J. This suit is founded on a rule taken upon the defendant to show cause why she should not comply with the terms of sale of a certain lot of ground situated in New Orleans and purchased by her at public auction on the twenty-sixth of March, 1870, by a duly licensed auctioneer of said city; she being the last and highest bidder for the property, and the same having been duly adjudicated to her, she is required by the proceeding taken against her to comply with the terms of the adjudication and receive title therefor.

The defendant answers by alleging defects in plaintiff's title, averring that he acquired the property from Riddell, and that the latter acquired it by an act of partition of the succession of his father, Dr. Riddell, which partition the defendant alleges was illegal, and therefore void, for the reason that the formalities of law required in judicial partitions were not observed in making the partition of the succession in question.

The judgment of the court was in conformity with the plaintiff's motion, and the defendant has appealed. The case comes up on a statement of facts and admissions of the parties.

The exceptions taken to the proceedings in partition are numerous and of a technical character. First. That the citation was directed to the natural tutrix individually and as tutrix of her minor children, whereas two citations should have issued, one to Mrs. Riddell in person and the other to her as tutrix. We see no weight in this objection. The citation informed her that on her own behalf as having an interest in the succession and as the representative of her minor children she was called upon to show cause why a partition should not be made. The co-heir having an interest, had a right to compel a partition. It was his duty to cite the other parties in interest. In this incipient proceeding there was no such conflict of interest between the tutrix and minors as made it necessary for the under tutor to represent them. These remarks embrace the first and second grounds. The third is that no trial was had on the issues made. A decree of partition was rendered. It was not appealed from, and seems to have been satisfactory to all the parties. Fourth. That the calling a family meeting to

Emmer v. Mrs. James Kelly.

deliberate upon the manner of making the partition and advise in relation to the proceeding on the part of the minors was made by petition of the tutrix instead of the under tutor. We think it was the province of the tutrix to act in that case. Fifth. That there was in the incipency of the proceedings such a confliction of interests as required the separate appointment of a tutor *ad hoc* to each minor. No such confliction of interest is shown. In the ulterior proceedings, especially in the act of making the partition, separate tutors were severally appointed for the minors. These tutors *ad hoc* specially appointed were duly sworn, and acted for the minors.

From the statement of facts we find there is no support given by them to the ground taken by the defendant that the partition was not duly homologated. The act of partition being completed, the notary by whom it was drawn up filed it in the proper court. A motion was filed by the tutrix suggesting the filing of the instrument, and obtained an order that the various special tutors show cause on a day fixed why the act of partition should not be homologated. Service of citation and petition was moved by all the tutors *ad hoc*. The motion was tried, counsel for the parties were present, the order of homologation was duly rendered and signed.

We see nothing in all the various objections rendering null these proceedings, which took place in 1867, and seem to have been regular and sufficiently in compliance with law.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

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No. 2287.—G. M. BENDER v. JAMES T. BELKNAP.

A party is estopped from contradicting in a subsequent action what he has judicially admitted or averred to be true in a previous action between the same parties.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Semmes & Mott*, for plaintiff and appellant. *W. B. Koontz*, for defendant and appellee.

WYLY, J. The plaintiff alleges that in his absence one James F. Ainsley took possession of his plantation, cotton and other property in the parish of Caddo, and on the twenty-seventh of August, 1863, sold to one J. Dryfus fifty bales of said cotton, giving his written obligation to deliver the same to said Dryfus or any holder of said instrument, at Shreveport, when called on so to do, and in the meantime to keep the possession thereof; that at a subsequent period said written contract got into possession of the defendant, who claimed it as his property, and by means thereof succeeded in getting possession of thirty-eight bales about the month of March, 1865, which were worth

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at the time \$300 per bale. Alleging that said Ainsley was wholly unauthorized to alienate his said property, he prays judgment against the defendant for the value thereof, to wit, \$11,000.

The answer is a general denial and the averment that the acts of the defendant in reference to said cotton were as agent for Martin Gordon, Jr., and this he made known to all the parties with whom he dealt. The court decided in favor of the defendant, and the plaintiff appeals.

Our attention is directed to a bill of exceptions taken by the plaintiff to the evidence of certain witnesses admitted by the court to prove that the defendant acted as an agent in regard to the cotton mentioned, and the value thereof claimed in the petition, and that the defendant did not receive any of the proceeds of the said cotton when sold, and never had possession thereof, but that he merely acted as agent or broker for Martin Gordon, Jr. The objection to this testimony was that it contradicted the judicial allegations and sworn averments of the pleadings in the case of *James T. Belknap v. G. M. Bender*, on the docket of the district court, parish of Caddo, a duly certified copy of which suit had already been offered in evidence by the plaintiff and was then before the court.

We think the court erred in receiving the testimony. The defendant was estopped by matter of record from denying his sworn averments and admissions in the suit which he brought at Shreveport against the defendant for nineteen bales of the cotton which he claimed under the contract between Ainsley and Dryfus. That suit was between the same parties as in this suit, and was to compel Bender to deliver nineteen bales to complete the contract between Ainsley and Dryfus, under which the defendant acknowledged that he received thirty-one bales, and by virtue of which he sought to recover the balance, to wit, nineteen bales. In that suit the defendant, Belknap, claimed to be the owner of the property due under the contract, and acknowledged having received thirty-one bales thereunder, and he averred the cotton was worth \$300 per bale. He obtained a writ of sequestration upon his oath that the averments of his petition were true, and he gave a bond as owner of the property. His suit was abandoned subsequently, and dismissed from the docket on the demand of Bender, the defendant therein, the plaintiff in this case.

It is a well settled rule in the administration of justice that a party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. The defendant will not be heard to contradict his sworn statement that he received the property in controversy as owner. The only means of courts to protect the integrity of judicial proceedings are the sanctity which the law throws around them, and if all the restraints of justice and truth are lost sight of by litigants, "the law itself meets the emergency by holding the parties to their

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allegations of record, and not permitting them to falsify what they have solemnly declared to be the truth." *Deuter v. Erwin*, 5 An. 18; *Gridley v. Conner*, 4 An. 416; *Freeman v. Savage*, 2 An. 269.

We think the plaintiff should have judgment for the value of the thirty-one bales which the defendant acknowledges having received from Ainsley, who was wholly unauthorized to sell the same, the said value being \$300 per bale according to the judicial averments of the defendant.

It is therefore ordered that the judgment herein be avoided and annulled, and it is ordered that there be judgment in favor of the plaintiff and against the defendant for \$9300, with five per cent. per annum interest thereon from the twenty-seventh of October, 1865, and costs of both courts.

No. 3437.—STATE ex rel. NEW ORLEANS AND HAVANA STEAMSHIP AND LOTTERY COMPANY v. THE JUDGE OF THE EIGHTH DISTRICT COURT.

The judge *a quo* is vested with discretionary power and authority to dissolve an injunction on bond. The writ of mandamus will not therefore issue from the appellate court directing the judge *a quo* to dissolve it on bond.

APPPLICATION for Writ of Mandamus. *Cotton & Levy* and *Albert Voorhies*, for relators. *H. C. Dibble*, Judge, respondent.

HOWE, J. The relators being under injunction in the Eighth District Court, applied to the judge thereof to have the injunction dissolved upon their giving bond under article 307 C. P. The judge, in the exercise of the discretion reposed in him by the article under which the application was made, declined to dissolve the injunction.

The relators now apply to this court for a mandamus to compel the Judge of the Eighth District Court to dissolve the injunction; in other words, to compel him, in the exercise of a distinctly conferred discretion, to do what he thinks he ought not to do, and therefore does not choose to do.

The doctrines that a mandamus can not be used to compel the performance of a discretionary act, and that this court will issue the writ only in aid of its appellate jurisdiction, are well settled.

An *appeal* from the action of a district judge under article 307 C. P. may lie in certain cases, as in *De la Croix v. Villeré*, 11 An. 39, and *White v. Casanave*, 14 An. 57, but we perceive no legal reason for the mandamus asked for in this case. As well might we issue a mandamus to compel the judge to decide the cause on its merits in such a manner as to suit the wishes of the relators and our own views of law and fact.

Mandamus refused.

23	700
452	1287
23	766
50	138

Dietrich v. Bayhi and D'Aquin.

No. 2432.—MICHEL DIETRICH v. L. BAYHI and H. D'AQUIN.

A stipulation in a written obligation to pay money that in case judicial proceedings be instituted to enforce payment, the lawyers' fees, fixed at ten per cent., to be at the cost of the maker, does not change its character from that of an ordinary promissory note.

A presentment by the notary of a promissory note to the maker for payment, is sufficient if made at his usual place of business, within reasonable hours, although he be absent therefrom at the time, because if absent during business hours he is bound to have some one there to represent him.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & P. Robert*, for plaintiff and appellee. *F. Fuselier*, for defendants and appellants.

HOWELL, J. H. D'Aquin has appealed from a judgment against him as indorser on the following note, to wit:

“ \$4305.

NEW ORLEANS, August 14, 1868.

Six months after date I promise to pay to the order of Michel Dietrich forty-three hundred and five dollars, for value received, negotiable and payable without defalcation or discount. Should the note not be paid at maturity, and judicial proceedings be instituted, the lawyer's fees, fixed at ten per cent., to be at the cost of the maker.

(Signed)

LEON BAYHI.

(Indorsed)

H. D'AQUIN,
MICHEL DIETRICH,
MRS. JOHN GAUCHE.

MICHEL DIETRICH, Attorney.”

Judgment was asked and rendered only for the sum of \$4305 and costs of protest and suit, with legal interest from date of maturity of this instrument.

The appellant's defense is that he is in no manner liable on the said instrument as indorser, security or otherwise, because it is not a promissory note according to the intendment of the mercantile law, and hence his signature is blank on the back of the instrument, he not being the payee, does not bind him as guarantor, surety or indorser under the commercial law or the civil law of Louisiana, and admitting it is commercial paper, he is released by the want of legal presentment and demand.

We think the additional clause to pay ten per cent. as lawyer's fees, which are not claimed in this suit, did not change the character of the instrument and make it different from what it is expressly declared to be, a note for a sum certain, payable at a date fixed. The payment of the sum was not made dependent on any condition. We consider the presentment and demand legal. The protest says the notary, “in order to present the said note, went to the office of the drawer, of this city and found no one in or about the premises of whom demand could be made, left my card on the desk of said drawer, stating the object

Dietrich v. Bayhi and D'Aquin.

of my call, and at the close of business hours had received no answer thereto."

It is well settled that a presentment at either the dwelling or place of business of the maker is sufficient, if within reasonable hours, and if at the place of business, it will be sufficient if made within the usual hours of business, although he be absent therefrom, for in both instances he is bound to have a suitable person there to answer inquiries and pay his notes if there demanded. Story on Notes, section 235.

Judgment affirmed

No. 3462.—STATE ex rel. D. C. BYERLY v. THE JUDGE OF THE EIGHTH DISTRICT COURT OF NEW ORLEANS.

A third party who shows an interest in a suit in amount sufficient to give the appellate court jurisdiction, may appeal from such judgment, and a mandamus will issue from the Supreme Court, on application of such third party, directing the judge *a quo* to grant the appeal.

APPEAL from the Eighth District Court, parish of Orleans. *Semmes & Mott*, for relator. *W. H. Cooley*, Judge of the Sixth District Court for the parish of Orleans, presiding in the Eighth.

TALIAFERRO, J. The Clerks of the Fourth and Eighth District Courts of New Orleans having obtained judgment in their favor in a proceeding by mandamus to compel J. S. Walton, Administrator of Finance of the city of New Orleans, to institute all suits under his control in his said capacity, wherein the city of New Orleans may claim taxes due it for the year 1870, irrespective of the amount involved, in the Fourth and Eighth District Courts, respectively, in equal aggregate amounts sued for, the relator in the present case, who is Clerk of the Third District Court of the parish of Orleans, conceiving himself aggrieved by the judgment, applied to the court by which it was rendered for a suspensive appeal. The appeal was refused, and he applied to this court for a mandamus to the Judge of the Eighth District Court requiring him to grant the appeal.

In answer to the rule granted by this court, the Judge of the Eighth District Court assigns as reasons for refusing to grant the appeal:

First—That this court is without jurisdiction *ratione materia* to hear and determine the questions raised by the pleadings in the case wherein the judgment complained of was rendered.

Second—That relator's interest in the suit, by his own showing, is not such as to entitle him to an appeal, as the judgment can work no injury to him, it being so far as relates to the judgment obtained by him in a similar case, *res inter alios acta*.

The point decided is that the Fourth and Eighth District Courts of the parish of Orleans are entitled, under the provisions of the act of

State ex rel. Byerly v. The Judge of the Eighth District Court of New Orleans.

the Legislature approved March 13, 1871, No. 48, to jurisdiction of all suits of what amount soever for the recovery of taxes imposed by or due to the city of New Orleans. The Clerk of the Third District Court contends that that court is vested by law with exclusive jurisdiction of all tax suits contemplated by the acts of the Legislature in relation to the city taxes, where the amount of the tax is less than \$100; and if the jurisdiction of claims for these small sums be illegally transferred to the Fourth and Eighth Courts, he will be deprived unjustly and unlawfully of the costs that might arise in the prosecution of all claims for taxes amounting in each case to less than \$100.

It is settled by several decisions of this court that a third party may appeal from a judgment if he allege and show a direct pecuniary interest in a suit, and that that interest amounts to a sufficient sum to give jurisdiction to the appellate court. The relator in this case made oath in the court below that he has an interest in the judgment appealed from to an extent exceeding \$1000, resulting from fees of office accruing to him as Clerk of the Third District Court. We think the appeal prayed for should have been granted.

It is therefore ordered that the rule be made absolute.

No. 2328.—O. B. GRAHAM & Co. v. HEMARD & HATTIER.

A defendant is essentially a plaintiff when he makes a reconventional demand. The burden of proving the demand in reconvention, therefore, falls exclusively on the defendant.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hornor & Benedict*, for plaintiffs and appellants. *E. H. McCaleb* and *E. Wooldridge*, for defendants and appellees.

HOWE, J. This is an action for a balance of account alleged to be due by defendants for advances, etc., made by plaintiffs on cotton shipped through their house to Liverpool by defendants.

There does not seem to be any dispute as to the amount of advances and charges, but the contest is over the reconventional demand of defendants, which, if sustained, brings the plaintiffs in debt. There was judgment in the lower court in favor of defendants for \$1129 06, and plaintiffs have appealed.

The reconventional demand is founded upon the allegation that defendants shipped through plaintiffs' house to Liverpool, per "Antonia," sixty bales of cotton; that the plaintiffs were instructed and agreed to sell it as soon as it should arrive; that if so sold in February, 1866, it would have brought nineteen and a half pence per pound; that in violation of their duty and agreement the plaintiffs did not sell this cotton until August and September, 1866, and at much lower prices, and thus caused great loss and damage to defendants.

It is of course incumbent on defendants, who are to all intents and purposes plaintiffs in reconvention, to establish with legal certainty their claim for damages. A careful examination of the record will show that they have not done this. On the contrary, the impression produced by the testimony is, that the sixty bales of cotton in question were shipped through plaintiffs' firm under an arrangement which left them a sound discretion as to time of sale, and that such discretion has not been abused.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the reconventional demand of defendants dismissed. It is further ordered that the plaintiffs, O. B. Graham & Co., have judgment as prayed for against Charles Hemard and Victor Hattier, composing the firm of Hemard & Hattier, defendants herein *in solido*, for the sum of \$4683 54, with legal interest from December 1, 1865, with costs of both courts.

Rehearing refused.

No. 3436.—JANE WETMORE v. MUTUAL AID AND BENEVOLENT LIFE INSURANCE ASSOCIATION OF LOUISIANA.

One of the clauses in the policy of a life insurance issued by the Benevolent Aid and Life Insurance Company of Louisiana was, that the insured agreed to pay into the treasury of the association one dollar and twenty-five cents upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French for five consecutive days. Held—That under this clause the assured was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication. That the company could not claim the forfeiture of the policy on that account until thirty days after the last of the five days of publication had expired.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. T. A. Bartlette*, for plaintiff and appellee. *J. D. Hill & H. N. Ogden*, for defendants and appellants

TALIAFERRO, J. On the third of June, 1870, the defendants insured the life of Robert Hancock Wetmore, who died on the ninth of September following. This suit is brought by the widow of the decedent to recover on the policy the sum of \$2935, the amount insured for, and interest on that amount at five per cent. from ninth November, 1870. The answer admits that the policy of insurance was taken out as stated, but defendant avers that the insured party having failed to comply with one of the conditions stipulated in the policy the act became void, and that defendant is not bound. The judgment of the lower court was rendered in favor of the plaintiff for the sum claimed, and the defendants have appealed.

The condition referred to in the defense reads thus: "Said Robert Hancock Wetmore hereby agrees to pay into the treasury one dollar and twenty-five cents, upon the death of any member of the associa-

Jane Wetmore v. Mutual Aid and Benevolent Life Insurance Association of Louisiana.

tion, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German and one in French for five consecutive days."

The company say that this assessment on Wetmore, made on the decease of Joseph Parisey, was due and unpaid until the expiration of the thirty days, at the end of which time the policy became forfeited, so that on the ninth September, 1870 (the day of Wetmore's death), the policy by its terms and conditions was null and void, and consequently no rights of any sort arose in favor of the plaintiff. The case turns upon the solution of the question, from what day does the thirty days begin to run? If the thirty days begin to run from the first day of publication, the time had elapsed before Wetmore's decease. If the commencement be on the last day of publication, the full period of thirty days did not elapse until after his death.

If the time begin to run from the first day of publication, why should the publication be required to be made for five days consecutively? The reason for requiring five days publication would seem to be that this repetition of the publication for five days would be more likely to bring to parties interested knowledge of the event published than a single insertion in the gazette. Taking, then, this construction of the clause stipulating the condition as correct, the publication five times is to be considered the notice, and to be deemed equivalent to notice served personally. Therefore the last day of publication, and not the first, is the period from which the thirty days begin to run. It was upon this, and as we think the correct view of the question, the judge *a quo* decided in favor of the plaintiff.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

No. 3187.—JACOB U. PAYNE v. BIDDY GRAHAM, Tutrix.

Real estate in the possession of a third party under a recorded title ostensibly valid can not be seized by a judgment creditor of his vendor, under the allegation of fraud, until the title itself has been set aside by a direct action. An injunction will therefore lie in favor of such third possessor restraining the seizure and sale by the judgment creditor.

23	771
52	934

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Breaux & Fenner*, for plaintiff and appellee. *E. D. Farrar*, for defendant and appellant. *Jacob Hawkins*, for defendant and appellant on rehearing.

TALIAFERRO, J. The defendant in this case, representing the succession of her husband, having obtained a judgment against Charles J. Hester, issued an execution and caused to be seized by the sheriff several tracts of land as property of Hester. The plaintiff enjoined

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the sale on the ground that he is the owner of the property, and in possession of it under title duly recorded in the parish of Madison on the sixth of November, 1869. The plaintiff had judgment perpetuating the injunction, and the defendant appeals.

In its important features, this case bears a close resemblance to the case of *Mary B. Waddill v. Payne & Harrison*, just decided, and it must be disposed of on the same grounds.

Payne & Harrison having a judgment against Hester, rendered by the Fourth District Court of New Orleans, recognizing a special mortgage on four tracts of land in the parish of Madison, and ordering the sale of them to pay a large debt owing by Hester to Payne & Harrison, seized under execution the mortgaged lands, which were sold, excepting one tract previously sold at sheriff's sale under the judgment in favor of Graham's succession, and the sale of which, under Payne & Harrison's judgment, was enjoined by Mrs. Waddill when advertised for sale under the seizure of Payne & Harrison. The sale went on as to the other tracts, and the plaintiff in this suit became the purchaser. The mortgage in favor of Payne & Harrison being the oldest of record in the parish of Madison against the property of Hester, and containing the pact *de non alienando*, no sale of any of the lands could legally have been made under the judgment and judicial mortgage of Graham's succession, unless they brought a sum exceeding the amount of the older mortgage. The second seizure under the same judgment, and which forms the subject of the present litigation, can have no greater effect. It seems, however, that the defendant has proceeded upon the assumption that the judgment of Payne & Harrison, rendered by the Fourth District Court of New Orleans, is an utter nullity, presenting the same arguments that were used to sustain the injunction in the case of *Mary B. Waddill v. Payne & Harrison*. The grounds taken by the plaintiff in that case we considered untenable for the reasons there assigned, and we refer to them as applicable in this case. Besides, the defendant having merely a judicial mortgage, and that of posterior date to the special mortgage of her opponents, and not even alleging simulation in the act by which Payne & Harrison acquired title, we are not clear that she could properly attack their title and possession by a direct seizure.

It is therefore ordered, adjudged and decreed that the judgment rendered by the district court be affirmed with costs.

Mr. Justice Wyly took no part in this decree

ON REHEARING.

WYLY, J. The defendant, Biddy Graham, tutrix, appeals from the judgment perpetuating the injunction herein sued out by the plaintiff,

• Payne v. Biddy Graham, Tutrix.

decreeing the latter to be the owner of the land seized, and condemning the defendant *in solido* to pay \$500 damages.

At the time the land in question was seized by the sheriff under the judgment of Biddy Graham, tutrix, v. Charles J. Hester, it was possessed by the plaintiff as owner under a recorded title ostensibly valid. It has been repeatedly held that such a title can not be attacked collaterally. 23 An. 134.

On this ground alone, and without expressing an opinion in regard to the other points presented in the case, we think the injunction should be perpetuated, reserving, however, the right of the defendant, Biddy Graham, tutrix, to inquire, in a direct action, into the validity of the title asserted by the plaintiff to the land in controversy.

It is therefore ordered that the judgment of this court, of the thirteenth day of March, 1871, be set aside, and it is now ordered that the judgment of the court below be amended by striking out that part thereof recognizing the validity of the plaintiff's title, and as thus amended that it be affirmed. It is further ordered that the plaintiff pay costs of appeal.

Chief Justice Ludeling is recused in this case.

No. 3188.—MARY B. WADDILL v. PAYNE & HARRISON.

A judgment rendered without legal citation to the defendant is absolutely null and void, and the nullity may be shown by any party in interest, wherever and whenever it is sought to be enforced.

The nullity of a judgment resulting from failure to cite the defendant may be urged before the court having jurisdiction of the property sought to be made liable to it, although it may have been rendered in another parish by a court which did not have jurisdiction of the property, and the party interested may, before the court having jurisdiction of the property stay its execution by the writ of injunction pending the inquiry into its nullity. 23 An. 557.

The fact that the judge *a quo* has pronounced a citation good and sufficient, and has rendered a judgment thereon, which has not been appealed from, and has thereby become final, does not conclude the defendant or any other party interested from urging its nullity for want of citation whenever and wherever it is sought to be enforced.

A citation must be addressed to the defendant and served upon him or his agent. A citation addressed to a third party and served upon the defendant is not binding upon and will not authorize a judgment against the defendant. A citation addressed to a third party, who is the authorized agent of the defendant, and served upon him, is not binding upon and will not authorize a judgment against the defendant.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. E. D. Farrar*, for plaintiff and appellant. *J. Hawkins*, for plaintiff, on rehearing. *Breaux & Fenner*, for defendants and appellees.

TALIAFERRO, J. The plaintiff enjoins the sale of certain lands seized by the defendants under *fiery facias* as judgment creditors of Charles J. Hester. She alleges that she is in possession of the lands seized as owner, having bought the same at a sheriff's sale made on

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the third of April, 1869, under execution issued against Hester at the suit of Biddy Graham, tutrix and administratrix, v. C. J. Hester. She exhibits the sheriff's deed as a muniment of title.

The defendants answer:

First—That plaintiff's petition discloses no cause of action.

Second—That defendants having prior special mortgages on the property when sold at the suit of Graham v. Hester, the plaintiff was compelled to assume the payment of all prior existing special mortgages; she has, therefore, no interest to justify her in bringing this suit; that she can only pay the defendants' debt secured by their mortgages upon the land or give up the land.

Judgment in the court below was rendered in favor of the defendants, dissolving the injunction, and the plaintiff has appealed.

This suit is the protraction of a litigation that was commenced between these parties in October, 1869. Payne & Harrison having seized these same lands under their judgment against Hester, recognizing their mortgages, Mrs. Waddill took out an injunction to prevent their being sold. The injunction was dissolved by the district court and she appealed to this court. The judgment of the district court was reversed by this court, principally on the ground that the seizing creditors, not having shown that their acts of mortgage contained the non-alienation clause, could not attack the title and possession of Mrs. Waddill by a direct seizure under an execution against a former owner. Upon the dissolution of the injunction on the trial of that case in the district court, Payne & Harrison caused a second *fiery facias* to issue and again seized the land. Mrs. Waddill again enjoined the proceeding and we have the contest again before us, with a wider range of evidence that enables us to have a clearer view of the merits of the controversy.

We find that on the third of August, 1857, Ransom Graham sold to Charles J. Hester several lots or parcels of land, composed of entries at the United States Land Office of the proper district, amounting in all to about seventeen hundred acres. This sale was made on a credit for the greater part of the price of one, two and three years, from the first of January next ensuing, a part to be then paid. A special mortgage and the vendor's privilege were retained to secure the payment of the purchase money. Graham died in 1859 and his wife, Biddy Graham, became his administratrix and tutrix of her minor children. Mrs. Graham, in her said capacity, brought suit against Hester in 1861 on his obligations for the payment of the price of his purchase, and obtained judgment against him on the twenty-ninth of October, 1861, with recognition of the mortgage and vendor's privilege. The judgment was recorded the same day it was rendered. An execution followed, the land was seized and sold on the third of April, 1869, and purchased by Mrs. Waddill at the price of \$600, leaving a large

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balance still due on the judgment. The mortgage retained by Graham in his sale to Hester in 1857 was never reinscribed and consequently lost its rank on the third of August, 1867, as the first mortgage on the property, the succession of Graham thereafter having only a judicial mortgage, dating and taking rank from the twenty-ninth of October, 1861. Hester, to secure a large indebtedness to the house of Payne & Harrison, of New Orleans, executed two mortgages in their favor on four separate tracts of land, containing over three thousand acres, all lying in the parish of Madison, one of these tracts being the land he purchased from Graham in 1857. The first of these mortgages was recorded in that parish on the eighteenth of March, 1860; the second on the nineteenth of January, 1861, and reinscribed on the first October, 1869. This mortgage, dated fourteenth December, 1859, and reinscribed first of October, 1869, contains the pact *de non alienando*. It was given to secure the payment of \$44,000, to be paid in two annual installments, for which six several promissory notes were given—three in amount equal to one-half the debt, payable in one year after date, and three in like manner equal to half the debt, payable two years after date. The mortgageor confessed judgment and renounced the benefit of all laws then in force in Louisiana requiring defendants to be sued in the parish or district of their domicile, and in case of legal proceedings against him to foreclose the mortgage, accepted the jurisdiction of any of the district courts of the city of New Orleans and stipulated that notice served on P. L. Mitchell or Walter Huntington, of New Orleans, of all judgments, orders of court, citations and copies of petitions, should be equally as binding as if delivered to or served on himself. Payne & Harrison, in conformity with the conditions and stipulations expressed in this act, proceeded *via ordinaria* to obtain judgment on their debt in the Fourth District Court of New Orleans on the fifth of May, 1866. By this judgment the right of mortgage was recognized and the land mortgaged ordered to be seized and sold. Execution issued on the judgment and all the lands specified in the mortgage were seized and sold, except that portion of them which Hester bought of Graham and which had been previously sold at sheriff's sale under the judgment of Graham's administratrix, and bought by Mrs. Waddill.

The plaintiff resists the claim of the defendants on two grounds:

First—That the pretended judgment rendered by the Fourth District Court of New Orleans is a nullity and can confer no rights upon the defendants. Plaintiff alleges as cause of the nullity that Hester, the defendant in that case, was not cited; that he never had a domicile or residence within the jurisdiction of that court; and that no service was ever made upon him or upon a legally authorized agent representing him.

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Second—That the judgment was rendered upon notes that were prescribed.

First—The waiver of domicile, acceptance of the jurisdiction of the courts of New Orleans and the appointment of agents to represent him and upon whom citation might be served, are all acts which Hester, at the time, had the right to do. The proceedings which the defendants predicated upon the rights then accorded to them, although not resorted to until after the passage of the law of 1861, prohibiting parties from electing domicile for the purpose of being sued, were legal, because the subsequent legislative act did not impair those rights. This question was settled by this court after able discussion by counsel in the case of *Jex v. Keary*. 18 An. 81.

The plea of prescription is not well taken. Three of the notes, amounting to \$22,000, were not due until the fourteenth of December, 1861. Citation was served upon Hester's agents on the tenth of April, 1866, eight months before the term of five years expired.

After the peremption of the mortgage from Hester to Graham on the fourth of August, 1867, the defendants' mortgage, which embraced the lands purchased by the plaintiff, was first in priority of rank and spread upon the records of the parish of Madison. The land in controversy being affected by it, a valid sale of the land could only have been made by selling it for a sum exceeding the amount of the prior mortgage. This was not done and the mortgage of the defendants consequently still attaches and the property may be made subject to it.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Mr. Justice Wyly took no part in this decree

ON REHEARING.

WYLY, J. The plaintiff appeals from the judgment dissolving the injunction sued out by her, to restrain the sheriff from selling the tract of land described in the petition, which she claims as owner, to satisfy the judgment of Payne & Harrison against Charles J. Hester, obtained on the fifth day of May, 1866, in the Fourth District Court of New Orleans, which said judgment renders executory a special mortgage bearing on said land, given by the said Charles J. Hester, the former owner thereof, on the fourteenth day of December, 1859.

The grounds taken for the nullity of the judgment sought to be executed on the land claimed by the plaintiff are, that the Fourth District Court of New Orleans was without jurisdiction to render the judgment of the fifth of May, 1866, against Charles J. Hester, who was a resident of the parish of Madison, by reason of the act of 1861,

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amending article 162 of the Code of Practice, and that the said Charles J. Hester was not legally cited.

To this the defendants reply that the citation was sufficient; that it was adjudged by the Fourth District Court to be sufficient, and whether right or wrong, that decision can only be reversed on appeal; and that if the judgment were null, the only court competent to pronounce its nullity is the Fourth District Court.

Citation is the foundation of the action, and a judgment without it or the appearance of the party sued is a nullity so absolute that it can be shown whenever and wherever it is sought to be enforced. In *Simpson v. Hope, sheriff, et al.*, 23 An. 557, this court held that the court having jurisdiction of the parish where the defendant resided and had his domicile had jurisdiction to enjoin the execution of a judgment against him rendered without citation in another parish, and that parol evidence was admissible to show the fact. In *Stevenson & Co. v. Riser et al.*, 23 An. 421, this court affirmed the judgment of the Second Judicial District Court, parish of Jefferson, declaring null the judgment of the Third District Court of New Orleans for want of sufficient citation. In *Leblanc, Jr., & Co. v. Perraux et al.*, 21 An. 26, this court said: "It is well settled that a judgment rendered against a party who has never been cited nor appeared, is an absolute nullity; that a court can presume nothing with respect to a party being cited; that nothing will cure defect of citation or want of service except appearing and answering to the merits." * * *

There is no force in the position that the sufficiency of the citation can not be inquired into, because the Fourth District Court, at the same time it confirmed the default against Hester, decided that the citation was sufficient, and no appeal was taken from that judgment. If Hester was not legally before the court, no part of the judgment was valid. If the court did decide that Hester was legally cited, as the defendants aver, but which fact does not appear in the record, it did not mend the matter, because Hester not being before the court, that judgment was not rendered contradictorily with him, and therefore did not bind him.

The main question, however, is, was Hester legally cited? If he was not lawfully before the Fourth District Court of New Orleans, the judgment of the fifth day of May, 1866, against him rendering executory the mortgage bearing on the property claimed by the plaintiff is not valid, and ought not to be executed. In that suit we find that the citation addressed to Charles J. Hester was not served on any one, the sheriff's return stating that, "after diligent search and inquiry, Charles J. Hester, the defendant herein, could not be found." * * *

The only citations upon which that default was confirmed were ad-

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dressed one to Walter Huntington and the other to P. L. Mitchell, and they were served upon them individually

The defendants contend that this was sufficient, because in the act of mortgage from Hester to Payne & Harrison, executed fourteenth day of December, 1859, there is the following clause, which justifies the manner of citation resorted to, to wit:

“And the said Charles J. Hester further renounces the benefit of all laws now or hereafter in force in the State of Louisiana, requiring defendants to be sued in the parish or district of their residence or domicile, and in case of legal proceedings against him for the purpose of foreclosing the present mortgage, he binds himself to accept, and he hereby expressly and formally accepts the jurisdiction of any of the district courts of the city of New Orleans, or of the district court of the parish of Madison, * * * hereby agreeing that notice served on P. L. Mitchell or Walter Huntington, of this city, of all judgments, orders of court, and likewise citations and copies of petitions, shall be equally as binding as if delivered to or served on himself.”

In the petition we find the following prayer:

“Wherefore, they pray that said Charles J. Hester be made defendant and cited to answer this petition, and if not cited that the said P. L. Mitchell and Walter Huntington be cited to answer in his place and stead; that they and each of them be served with a copy of this petition, and be recognized as fully authorized to represent and answer for the said Charles J. Hester in this suit, and that the said service of citation herein, and of all other notices herein on them or either of them, be adjudged to be as binding on the said Hester as if the same had been delivered to and served on him.”

In the clause of the act of mortgage quoted we fail to perceive any waiver of citation, if such could be legally made in advance when the debt was contracted; nor is there any waiver of the formalities required by article 179 C. P., to constitute a valid citation.

The agreement “that notice served on P. L. Mitchell or Walter Huntington, of this city, of all judgments, orders of court, and likewise citations and copies of petitions, shall be equally as binding as if delivered or served on himself,” did not bind Charles J. Hester to waive citation, nor did it amount to a waiver of the requirement that the citation “must mention the title of the cause, the name of the defendant to whom it is addressed,” and the other formalities required by article 179 C. P.

The clause appointing agents on whom citation may be served, can not fairly be construed as an agreement that there shall be no citation, or the formalities in the citation may be dispensed with.

If the citations served upon P. L. Mitchell and Walter Huntington had been served on Hester himself, they would not have been suffi-

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cient to bring him legally before the court. How such citations, when served upon parties claiming to be agents of Hester, under the clause in the act of mortgage to which we have referred, can be more efficacious than they would be if served on their principal, we can not imagine.

If the rule that the "court can presume nothing with respect to a party being cited," and "that nothing will cure defect of citation or want of service except appearing and answering to the merits," 21 An. 26, is to be adhered to, we do not see how the judgment against Hester can be valid, because the only citation in the suit addressed to him was not served, and the citations addressed individually to Mitchell and Huntington were not citations to Hester. Hester's agreement that citations for him might be served on Mitchell or Huntington, might make the service in that manner valid; but it could not make valid a citation upon its face invalid. 12 L. 596.

The authorities of *Cooper v. Polk*, 2 An. 159, and *Monition of Hall*, 21 An. 692, declaring the citation for an absentee valid, if addressed either to the party or his curator *ad hoc*, relied on by the defendants, are not applicable to this case. Here the citation was not addressed to Hester or to a curator *ad hoc*, Hester being not an absentee, but a resident of the parish of Madison.

"Citation must be addressed to the defendant in the suit, otherwise it is defective and void." *Bertonlin v. Bourgoin*, 19 An. 360; C. P. 179, 20; 6 L. 577; 5 N. S. 429; 18 An. 481; 21 An. 630; 17 L. 42; 2 L. 169; 7 N. S. 161; 13 An. 405; 21 An. 482.

We conclude, therefore, that the judgment of the defendants, Payne & Harrison, against Charles J. Hester, sought to be executed on the land claimed by the plaintiff, was a judgment without citation, and therefore it is an absolute nullity. 23 An. 421; 1 N. S. 9; 2 R. 512; C. P. 206.

The plaintiff, possessing the land as owner, has sufficient interest to have the nullity pronounced. 23 An. 134.

Taking this view in regard to the citation, it becomes unnecessary to examine the question of jurisdiction of the Fourth District Court, by reason of the act of 1861 amending article 162 C. P., or to consider the ruling of this court in *Jex v. Keary*, 18 An. 81, as to the correctness of which we express no opinion.

As to the validity of the title of the plaintiff to the land seized, it will be time enough to consider that when the defendants shall have instituted legal proceedings to subject it to their mortgage, if they have one. They will not be permitted to sell the land under a judgment found to be absolutely void, however defective and imperfect the title of the plaintiff may be.

It is therefore ordered that the decree herein of this court of thir-

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teenth day of March, 1871, be set aside, and that the judgment appealed from be avoided and annulled; and it is now ordered that the injunction sued out by the plaintiff be perpetuated, and that the judgment sought to be executed be decreed an absolute nullity. It is further ordered that the defendants, Payne & Harrison, pay costs of both courts.

Mr. Justice Taliaferro adheres to the former decree in this case
Chief Justice Ludeling recused.

No. 3502.—THE STATE OF LOUISIANA ex rel. JOHN C. GOLDING et als.
v. JAMES GRAHAM, Auditor.

The Board of Assessors for the year 1867, who were removed from office before the one per cent. tax was levied by the General Assembly of 1868, have no right or claim to the per cent. allowed them as assessors, on the ground that their successors used the assessment rolls prepared by them in assessing the one per cent. tax of 1868. The suit against the Auditor to compel him to warrant on the treasury for such a demand was held to be vexatious.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. John M. Cooney and R. S. Dennie*, for relators, appellees. *Hornor & Benedict*, for Auditor, appellant

LUDELING, C. J. The relators were members of the Board of Assessors for the parish of Orleans in the year 1867. They aver that by the provisions of act No. 55, of the General Assembly of 1865, their compensation was fixed at three per centum on the amount of taxes on property, gross receipts, etc., and they claim that they are entitled to receive the same per centage upon the one per cent. tax levied by the act No. 114 of the General Assembly, approved twenty-ninth September, 1868, as the tax rolls of 1867 were used as the basis of this tax. They claim \$44,076 44.

The evidence shows that the relators were removed from office on or about the seventeenth of July, 1868, months before the one per cent. tax was levied by the General Assembly. According to the theory of the relators, if the Legislature which is to convene next month should see fit to adopt the assessment of last year as a basis for levying the taxes for the current year, the assessors who made that assessment, who have been paid already for making it, would be entitled to be paid again. The proposition is preposterous. The suit is frivolous and vexatious, and we regret we have not the power to mulct the relators in damages.

It is ordered that the judgment of the court *a qua* be avoided and reversed, and there be judgment in favor of the defendant rejecting plaintiffs' demand, with costs of both courts.

Leathers et al. v. Cannon et als.

No. 2412.—THOMAS P. LEATHERS et al. v. JOHN W. CANNON et als.

In a suit for a settlement of partnership accounts, the question as to whether a certain fund is a partnership asset, belongs of right to the merits of the case, and should not be passed upon in an appeal from an order appointing a receiver

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. T. S. McKay and Race, Foster & E. T. Merrick*, for plaintiffs and appellees. *A. & H. Marr*, for defendants and appellants.

HOWE, J. This is an appeal from an order granted upon the application of plaintiffs for the appointment of a receiver of certain funds in the hands of Kennett & Bell, codefendants with Cannon, alleged to be assets of a partnership which had existed between plaintiffs and Cannon in the business of owning and running a steamboat.

The answer of Kennett & Bell admits a balance in their hands of \$4890 94 to the credit of the owners of the boat, and the plaintiffs claim that this is a partnership asset. The defendant Cannon admits that there was a partnership in running the boat, though he contends that the funds in the hands of Kennett & Bell, derived from the insurance on the boat after her loss, and the sale of certain property of the boat, belong exclusively to him. He prays in his answer for a liquidation and settlement of accounts between the parties.

The right of the court to appoint a receiver is not contested. The sole ground urged by appellants, as we understand them, is that the fund is not a partnership asset. But we think this question would be more properly determined on a trial of the merits. Conceding the right of the court to appoint a receiver under the case presented by the plaintiffs' petition, and this is not disputed, we think the record shows a state of facts justifying the order appealed from.

Judgment affirmed.

Rehearing refused.

No. 2878.—CITY OF NEW ORLEANS v. A. W. WALKER

The burden falls on a taxpayer, who aims to go behind the assessment roll, of showing that he applied to have it corrected within the time allowed by law.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. George S. Lacey*, City Attorney, for plaintiff and appellee. *John S. Tully*, for defendant and appellant.

TALIAFERRO, J. We gather from the pleadings that upon a motion made in the Seventh District Court of New Orleans by the assistant city attorney, for judgment against the defendant on a tax bill amounting to \$643 50, due the plaintiff, the defendant filed an exception and answer, averring that he is an inhabitant of the parish of St. Bernard, and is properly taxable there; that the property, assessed at \$30,000, is not urban but extra urban property. He denies that he owes the

plaintiff anything, and sets up against the plaintiff a large reconventional demand. The exception was overruled, the motion for judgment against the plaintiff was sustained, and he prosecutes this appeal.

We think the judgment of the lower court correct. The law prescribes the mode by which erroneous assessments of property may be corrected. It is by examining the assessment rolls within the time allowed the taxpayers for having errors corrected, of which due notice is given. Having failed to avail himself of the privilege of examining the tax rolls and having them corrected if necessary, the injury, if any, is the result of his own inattention. *Vigilantibus, non dormientibus subvenit lex.*

We do not see that he has made out by the proof he introduced that the property assessed at \$30,000 is not taxable by the city. A party aiming to go behind the assessment roll ought to give some satisfactory reason why he did not have the corrections made within the time assigned for corrections. He should specially allege and prove the errors. 21 An. 439. All the formalities required by the special laws for the assessment and collection of the city taxes appear to us to have been followed, and the defendant has not satisfied us that he is entitled to relief.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

No. 3259.—CITY OF NEW ORLEANS v. BERNARD HERES.

A person driving a horse and vehicle through the streets of New Orleans who, by inattention or negligence, allows the horse to run away, is liable to the city for the damage done to the public property of the city by the running away of the animal. The measure of damages in such a case is the injury done to the property.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. George S. Lacey*, City Attorney. *Clarke, Bayne & Renshaw*, for defendant and appellee.

WYLY, J. On the twenty-seventh day of September, 1870, the defendant and his driver, with a horse and vehicle belonging to the former, stopped at a grocery store on the corner of Annunciation and Robin streets for the purpose of selling vermicelli. Defendant and his driver left the animal unhitched, and with no precaution to guard against his running away. While thus negligently and carelessly suffered to remain, the horse took fright and ran away with the wagon through the fence of Coliseum Square, and damaged the same to the amount of \$600, as the plaintiff alleges, and for which sum prays judgment against the defendant. The defense is a general denial.

The court gave judgment for \$20 and costs, and the city of New Orleans has appealed.

City of New Orleans v. Heres.

There is no doubt that the damage was occasioned by the gross negligence of the defendant or his driver, and that the plaintiff should recover judgment for the amount thereof.

It is shown that the city has incurred the expense of \$500 in repairing the railings; but, on the other hand, it is contended that the railings were not in good repair at the time the damage occurred, and such seems to have been the fact.

It is in proof that the defendant estimated the amount of the damage at \$250. We have concluded to fix the amount of the damage at \$375, the median between the estimate of the plaintiff and that of the defendant.

It is therefore ordered that the judgment of the court *a qua* be annulled, and it is ordered that the plaintiff recover of the defendant \$375, with five per cent. per annum interest from judicial demand and costs of both courts.

No. 2339.—A. T. STEWART & CO. v. L. HAAS et als.

If a suit or litigation be settled by compromise, no one of the parties to the litigation can, after recovering the portion allotted to him by the settlement, be permitted to deny his sanction to the agreement.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Elmore & King*, for plaintiffs and appellants. *O. Roselius, Clarke & Bayne* and *E. C. Billings*, for defendants and appellees.

LUDELING, C. J. This suit grows out of the bankruptcy of Loeb, Simon & Co. The plaintiffs were creditors of said firm, and also of Mr. Simon individually. The partners owned jointly real estate which was sold by the assignee for about \$76,000. The property appeared to be encumbered with mortgages for about \$95,000, and the assignee took a rule upon the mortgage creditors to settle the rank of their respective mortgages. At this stage of the proceedings A. T. Stewart & Co. filed an opposition to the claims of all the mortgage creditors, alleging the nullity of all the mortgages. The mortgage creditors were E. A. Jacobs, Vincent & Co. and L. Haas. An agreement was entered into between the attorneys representing the plaintiff and the mortgage creditors that the mortgage creditors would pay to the plaintiffs \$3000 if they would dismiss their opposition, so as to permit the distribution of the funds in the hands of the assignee. The object of this compromise seems to have been to avoid the delay incident to the litigation.

In accordance with this agreement, the plaintiffs dismissed their opposition, and the funds were distributed under a decree of the United States District Court, and Jacobs, Vincent & Co. and L. Haas received their proportions thereof. Jacobs and Vincent & Co. paid to the plaintiffs \$2000 in accordance with the agreement aforesaid, but L.

 Stewart & Co. v. Haas et al.

Haas refused to pay his quota, on the ground that his attorney had no authority to enter into the agreement, and he repudiates the compromise.

The evidence is somewhat conflicting as to whether or not L. Haas assented to this agreement or authorized his attorney to make it before it was made. But of this there can be no doubt, that with a full knowledge of the agreement and of what had been done under it, he received his proportion of the funds distributed. He cannot be permitted to enjoy the fruits of the compromise and at the same time to repudiate the corresponding obligation imposed on him by it.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment against L. Haas for \$1000, with five per cent. per annum interest thereon from the twenty-fifth day of March, 1869, till paid, and costs of suit in both courts.

No. 3613.—THE STATE OF LOUISIANA *ex rel.* N. A. ROBINSON *v.*
CHARLES F. DRANGUET.

In a proceeding under the intrusion act to test the right of any person to an office, the State is a necessary party to the suit, and if it be shown that the incumbent is an intruder, he will be ejected without reference to the rights of the claimant to the office.

The failure of a person who has been elected or appointed to an office to take the oath prescribed by the eligibility act of the twenty-sixth of August, 1868, within the time prescribed, does not *ipso facto* destitute him of the office.

The Legislature has no power to increase or diminish the term of office fixed by the Constitution, nor has the Legislature any power to fix conditions or impose penalties on a person holding an office which are not authorized by the Constitution.

The appointment of any person by the Governor to an office not vacant is absolutely null.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Charles A. Bullara*, District Attorney *pro tempore*, and *R. M. Kearney* and *J. M. B. Tucker*, for relator, appellee. *Scmmes & Mott*, for defendant and appellant.

LUDELING, C. J. This is a proceeding under the intrusion act. Revised Statutes, p. 271, sec. 1150.

The petition of the relator represents that N. A. Robinson was elected district attorney for the Ninth Judicial District in April, 1868; that he qualified and was duly commissioned, and that he discharged the duties of said office until about the first of August, 1871, when the defendant intruded into said office, and he unlawfully performs the functions of said office under color of an appointment and commission from Henry C. Warmoth, Governor of the State of Louisiana. The evidence sustains the foregoing statement of facts.

The only defenses made in this court are:

First—That the plaintiff only took the oath of office prescribed by article 100 of the Constitution, and failed to take the oath prescribed

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by the eligibility act of the twenty-sixth of August, 1868, p. 46; and that under the fifth section of that act the office became vacant within thirty days after the promulgation of the act.

Second—That the relator must recover on the strength of *his own title*.

First—In the case of State ex rel. R. C. Downes v. E. B. Towne, 21 An. (which like this was a contest for an office created by the Constitution), this court said: "Failure to take the oath testing his eligibility, and to file it in the office of the Secretary of State in the time limited in act No. 39 did not *ipso facto* destitute him of his office. It was not in the power of the Legislature to legislate him out of office, or to diminish or increase his term of office as fixed in the Constitution." The precise question was decided against the pretensions of the defendant in that case, and time and reflection have only strengthened our conviction then expressed. 21 An. 492.

Second—The State is a party plaintiff to the proceedings, and as to the State, it is not essential to show that N. A. Robinson was entitled to the office; the defendant could be ejected from office, if an intruder, whether the State showed that Robinson had a valid title to the office or not.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 2350.—MARTIN BETZER v. JOHN COLEMAN and others.

An account closed and acknowledged is only prescribed by ten years.

One witness is sufficient to prove an account aggregating an amount above five hundred dollars, if no one item of the account exceeds that sum.

23	785
107	270
23	785
121	685

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Braughn & Ogden*, for plaintiff and appellee. *Hornor & Benedict*, for defendants and appellants.

Howe, J. Dennis Cronan has appealed from a judgment rendered against him as a partner of John Coleman & Co. for \$681 30, for a bill of work done in blacksmithing, etc. He makes two points:

First—The prescription of three years as to an open account. We do not think the prescription applicable, inasmuch as the account seems to have been closed by rendition and acknowledgment in 1862, and subject only to the prescription of ten years. *James v. Fellowes*, 20 An. 119. But if this is not so, the evidence shows an interruption of the prescription of even three years by repeated acknowledgments by Cronan. His statement that he never promised to pay it is irrelevant. It is the acknowledgment which interrupts prescription, Rev. C. C. 3520; and he certainly acknowledged the claim repeatedly up to the beginning of the suit, in such way that prescription was never acquired,

each time putting off the plaintiff with the promise that it should be settled when he "got out of court," that is, when the affairs of the partnership should be liquidated.

Second—That the account, being over \$500, was not proved by two witnesses, or by one witness with corroborating circumstances. No item of the account exceeds seventy-five dollars, and it may be doubted whether the rule invoked has any application. 19 An. 71. But if it have, the correctness of the account is amply corroborated by the testimony of Cronan himself.

The appellee has asked for damages.

It is therefore ordered that the judgment appealed from be affirmed, with thirty dollars damages and costs.

No. 3511.—STATE OF LOUISIANA ex rel. J. H. RILLS v. BARTHOLOMEW L. LYNCH—C. O. LAUVE, Intervenor.

The act No. 120 of 1868, which confers the power on the police juries of the different parishes to appoint a district attorney *pro tempore* within thirty days, does not prohibit them from making the appointment after the thirty days have expired. An appointment of a district attorney *pro tempore* by the police jury after the expiration of thirty days is valid, provided the power of making such appointment, conferred upon the parish judge in the act, has not been exercised before it is made.

In case the police jury has made the appointment after the expiration of thirty days, but before the appointment by the parish judge, then the appointee has an indefeasible right to the office, and the person appointed afterward by the parish judge is an intruder into the office.

A district attorney who falls or refuses to bring a suit to test the right to an office under the intrusion act, may be compelled by mandamus to bring such suit. 21 An. 655

A PPEAL from the Fifth Judicial District Court, parish of Iberville. Posey, J. Mark A. Estevan, District Attorney, and Barrow & Pope, for relators. B. L. Lynch, defendant, in proper person.

LUDELING, C. J. This is a suit under the intrusion act to oust the defendant, B. L. Lynch, from the office of district attorney *pro tempore* for the parish of Iberville.

A great many legal questions have been discussed by counsel which we do not feel called upon to decide in this cause. The evidence shows that the relator, J. H. Rills, was appointed district attorney *pro tempore* for the parish of Iberville by the police jury of said parish on the first Monday of January, 1869; that said Rills qualified and entered upon the discharge of the duties of the office, and he continued to exercise the functions of said office until the eighth of June, 1870, when the defendant usurped the said office, under the pretense of an appointment made by the parish judge and approved by the police jury.

It is contended that the police jury which appointed Rills had not the right to make the appointment at the time it was made, because

State of Louisiana ex rel. Rills v. Lynch—Lauve, Intervenor.

act No. 120 of the General Assembly of 1863, which conferred the right to make such appointments on the police juries, limits the period within which they shall make the appointments to thirty days after the promulgation of the act. The language of the statute is, "that within thirty days after the date of the promulgation of this act there shall be appointed a district attorney *pro tempore* in each parish of the State, except the parish of Orleans, by the police jury of the parish, and in the event of failure of the police jury to make such appointment within the time aforesaid, the parish judge of the parish shall make such appointment."

The statute does not prohibit the police juries from making the appointments after the thirty days, but in that event the statute confers the same power on the parish judges. The purpose of the law was to guard against the possibility of a vacancy in the office, and after the expiration of the thirty days either the police jury or the parish judge could have appointed a district attorney *pro tempore*, and the party which first exercised the power exhausted it. 3 An. 195, *Wilson v. State Bank*; 14 An. 207, *Barrow v. Rabichau*; Cooley's Constitutional Limitations, 77 *et seq.*

The appointment of J. H. Rills by the police jury on the fifth January, 1869, is valid. The subsequent police jury had not the power to remove him, 21 An., *Downs v. Towne*, 490, and the appointment by the judge was made in error.

The defendant objects that this suit has not been brought by the district attorney, inasmuch as he refused to bring the suit until he was compelled by a writ of mandamus issued by the district judge against him; that having acted under duress the act of bringing this suit can not be said to be his act.

A sufficient answer to this is, that no appeal has been taken from the judgment making the mandamus peremptory, and it is *res judicata*; and that this suit is, in fact, brought by the district attorney. But this court decided in *Hays v. Thompson* that a district attorney could be made to bring such a suit by a writ of mandamus. 21 An. 655.

It was further decided in that case that no suit could be brought by a private individual under the intrusion act, but that such suits must be instituted by the Attorney General or district attorneys. It follows, therefore, that the intervention of C. O. Lauve was unauthorized by law.

It is therefore ordered and adjudged that the judgment of the district court be avoided and reversed, and that there be judgment in favor of J. H. Rills, recognizing him as district attorney *pro tempore* for the parish of Iberville, the defendant and intervenor paying costs of both courts.

Bezou, Commissioner, v. Pike, Lapeyre & Brother.

No. 2408.—H. BEZOU, Commissioner, v. PIKE, LAPEYRE & BROTHER.

In this case the defendants discounted the note of the president of the Citizens' Mutual Insurance Company and took in pledge as collateral security the stock of the Citizens' Bank, owned by the company. The proceeds of the note went to the benefit of the insurance company to the knowledge and with the consent of the board of directors.

Held—That, waiving the question as to whether the president of the insurance company had the right to pledge the stock owned by the company, yet the knowledge of, and the acquiescence in, the pledge and the receipt of the proceeds by the board of directors, amounted to a ratification of his acts, and the company was thereby bound.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. G. Schmidt*, for plaintiff and appellant. *Hayes & New*, for defendants and appellees

HOWELL, J. The plaintiff, as commissioner appointed to liquidate the affairs of the Citizens' Mutual Insurance Company, claims of defendants the sum of eighteen thousand dollars, the value of one hundred shares of the stock of the Citizens' Bank of Louisiana and the dividends accrued thereon, which he avers they illegally detain under pretense that it has been pledged to them by Omer Gaillard, late president of said company, which, even if true, does not authorize defendants to retain the said stock because the president had not the power to pledge it.

The defendants answer that, according to the usages of commerce, they discounted a note of the Citizens' Mutual Insurance Company through its president, O. Gaillard, for \$10,000, upon a pledge of said stock, which note and pledge were renewed several times and increased to \$15,000, and upon final maturity the pledge was sold for \$425 less than the debt, which sum they claim in reconvention. They allege that the discount was made for the benefit of the insurance company and was used by it in the regular course of its business, and that said discounts and pledges were authorized and ratified by the board of directors of the company; and further that the company did business with them as bankers; that the proceeds of the discounts were placed to its credit and paid on the checks of the president and secretary.

Judgment was rendered as prayed for by defendants and the plaintiff appealed.

In the language of his counsel's brief: "The issues made in this cause on the merits present simply the question, whether the president of the insurance company was authorized to bind the company by his note and pledge the bank stock belonging to it for its payment?"

Concedo that there was no resolution of the board of directors or provision in the by-laws of the company expressly authorizing the president to make the note and pledge, it is shown that they were made by the president and the proceeds drawn out of defendants'

Bezou, Commissioner, v. Pike, Lapeyre & Brother.

bank upon the checks of the president and secretary and used for the benefit of the company to the knowledge of the directors, who, by their acquiescence, ratified the acts of the president and made them the acts of the company or corporation, which is vested with all the powers necessary for conducting its business and can act only through its officers and directors. The fourth article of the charter gives the directors "full power to do and perform all acts and things not herein provided for which may be necessary to carry into effect the object and purposes of the company."

The object of the company was to make insurance on various kinds of property against loss or damage by fire and water. By the sixth article of the charter the board of directors were empowered to invest the profits of the company or a portion of them in the purchase of bonds or stocks issued or created by or under the laws of the United States or of this State or the ordinances of the city, and make loans of said profits on pledge of any of said bonds or stocks. If they could thus invest their funds in the purchase of stocks or in loans on pledge thereof, they certainly possessed the power of converting such purchases or loans into cash by sale or pledge when money was needed to pay risks. Otherwise the object of the incorporation would fail. Making insurance involves necessarily the obligation to pay loss, and the means or funds of the company must be used for such payment and can not properly be so invested as to render such payment impossible, as would be the case if the investments could not be converted to cash.

We think it evident and unavoidable that the company, through its directors and officers, had the right to sell or pledge the stocks owned by it, and that if the president was not specially authorized by the board of directors to make the note and pledge in favor of defendants, the entry of the transaction in the books of the company and the drawing of the proceeds and using them for its benefit, brought knowledge to the directors and amounted to a ratification of the transaction.

The law of agency invoked by plaintiff's counsel is not properly applied by him in this case. A corporation, as an intellectual being, is vested with the powers necessary for the purposes for which it was incorporated, and as above said it can act only through its officers, who exercise those powers in the manner provided. The power or authority to make loans, execute notes, pledges, etc., by corporations is not derived from or regulated by the law of mandate as contained in the Civil Code, but from the law of its creation and if not conferred by the express letter of its charter, may be inferred or implied from the powers actually conferred. The powers of the attorneys or officers of the corporation, if not expressly determined by the charter or by-laws,

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are regulated as those of other agents and their exercise may be ratified by the corporation as those of other agents may be ratified by their principals. R. C. C. 438 *et seq.*, 3000, 3010; 23 An. 235.

The case of *A. Levy et als. v. Mutual Benefit Life and Fire Insurance Company*, 8 An. 380, relied on by plaintiff, differs from this in the fact that the directors in that case did an act in conflict or inconsistent with an express provision of the charter, to wit: the making a different use of the premium notes from that stipulated in the charter, while in this case the funds intended for the payment of losses were used for the purpose intended and it was a question within the discretion of the directors whether it was to the interest of the company to sell or to pledge the stock in question and in which their funds had been invested.

Judgment affirmed.

No. 3311.—STATE ex rel. A. DE MONASTERIO v. ALFRED SHAW,
Administrator, et als

Act No. 5 of extra session of 1870, approved March sixteenth, 1870, which prohibits the remedy by mandamus against the city of New Orleans and the officers thereof, applies with equal force and effect against any creditor or pretended creditor who seeks by mandamus to compel the administrators of the floating debt of the city to approve all claims without examination which may be presented to such committee to be audited and approved.

The administrators of the floating debt being invested by virtue of their powers as such board with a discretion, to either allow or disallow such claims, cannot be compelled by mandamus to allow any particular claim, although it may have been warranted for by one of the corporations now consolidated with and included in the corporation of New Orleans.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Lea, Finney & Miller*, for relators. *George S. Lacey*, City Attorney, and *Hornor & Benedict*, for defendants and appellants.

WYLY, J. This is an application for a mandamus on the Mayor, the Administrator of Accounts, and the Administrator of Finance of the city of New Orleans, to direct the Administrator of Accounts to prepare and include in the statement of matured obligations of the city of New Orleans, existing the sixteenth March, 1870, the sum of \$2930, due to relator as holder of certain warrants; to attest the said statement; to furnish the same as attested and approved by the Mayor and Administrator of Finance of New Orleans to the Administrator of the Floating Debt, and directing said Mayor and Administrator of Finance to approve said statement.

The official acts thus sought by relator to be performed by respondents, are said to be imposed upon them by section 40 of the act of the Legislature of sixteenth March, 1870 (session acts 1870, p. 46), and are intended to place in possession of relator a certificate from the Administrator of the Floating Debt, by which relator would be enabled to

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obtain from the city of New Orleans the said sum of \$2930 which he alleges to be due to him.

The defendants excepted to the form of proceeding on the ground that under act No. 5 of the extra session of 1870, the writ of mandamus can not legally issue against them for the purpose stated in the petition, and because the duty required of them under section 40 of act No. 7 of the extra session of 1870 is not purely ministerial, but in furnishing "a full and correct statement of all the mature obligations of the city," and in attesting the same as required by the statute, the defendants are invested with some discretion as to the validity of the claims or obligations so to be attested by them, and that the writ of mandamus will not lie to compel them to perform a duty involving discretion to be exercised by them.

The court gave judgment for the relator rendering the mandamus peremptory, and the defendants have appealed.

The debt for which the relator seeks the summary remedy of mandamus, consists of seven warrants issued by the police jury, parish of Orleans, right bank, for the aggregate amount of \$2930. The authority for the proceeding is claimed to be in section 40 of act No. 7, extra session of 1870, and is as follows:

"That the Administrator of the Floating Debt of the city of New Orleans and the corporations consolidated by this act, shall be furnished with a full and correct statement of all the mature obligations of the city at the date of the passage of this act, to wit: Of all final judgments, warrants, registered certificates and unredeemed city notes, used as currency, which have been issued by said cities and police jury, as consolidated by this act; that said statement shall be prepared by the Administrator of Public Accounts of the city, and by him attested under oath, and shall be further approved by the Mayor and the Administrator of Finance, and it is hereby made the duty of the Administrator of the Floating Debt of the city of New Orleans, as constituted by this act, to issue to all holders of the evidences of the debts included in said statement a certificate for the amount of their respective debts, which certificate shall obligate the said Administrator of the Floating Debt to pay to the holder or his order, out of the bonds or the proceeds thereof which may be placed with said Administrator for such purpose, the full amount expressed in said certificate, with seven per cent. interest from the date of the issue thereof."

This act was approved on the sixteenth day of March, 1870.

The act which defendants contend prohibits the remedy by mandamus sought in this case, is act No. 5, extra session of 1870, which was approved seventeenth day of March, 1870, one day later than the act to which we have referred. Its title is "An act to limit and

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restrict the power of courts to issue orders or writs of mandamus and *feri facias* against the city of New Orleans and the officers thereof, and to declare the effect and prescribe the mode of satisfying judgments for money against the city of New Orleans."

Section first provides "that from and after the passage of this act, no court within the State shall have authority or jurisdiction to allow, order, hear, entertain or enforce any summary process or proceeding or writ or order of mandamus, either against the Controller, Deputy Controller, or *any auditing officer*, to issue and deliver any order or warrant for payment of money, or against the Treasurer, Assistant Treasurer, or any officer or officers charged with the disbursement of the moneys of the city of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons, corporation or corporations whatsoever, but all actions or proceedings for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the ordinary form of action, instituted against the city of New Orleans as a corporation, and not against any branch, department or officer thereof, and shall in all respects be conducted in the same manner as ordinary actions."

This statute, fairly interpreted, we think, prohibits the remedy of mandamus sought by the relator in this case. This is a proceeding directly or indirectly for the recovery of a sum of money claimed to be owing the relator by the city of New Orleans; that is undoubtedly the ultimate if not the immediate object of the suit. This object can not be accomplished by employing the writ of mandamus, because the law commands that "all actions or proceedings for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the ordinary form of action, instituted against the city of New Orleans as a corporation, and not against any branch, department or officer thereof, and shall in all respects be conducted in the same manner as ordinary actions."

If the relator had included in his proceeding the Administrator of the Floating Debt, undoubtedly the suit would be against the auditing and disbursing officers of the city directly for the object of enforcing payment of money claimed to be due to him as holder of the warrants of the police jury, which warrants the defendants contend are not valid debts against the city.

Stripped of its verbiage, we apprehend the meaning of the statute to be, that neither the auditing nor disbursing officers of the city shall be proceeded against summarily or by the writ of mandamus in a suit, "the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons, corporation or corporations whatsoever," but

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that all such suits shall be in the ordinary form of action against the city as a corporation and not against its several officers.

Considering the evil which existed, the remedy prescribed and the object of the law makers, rules which should govern this court in ascertaining the meaning of the statute, we think the interpretation given is a fair one, and that it conveys the true meaning of the law.

The evil was the embarrassment in the administration of the city government, resulting from the use of the writ of *feri facias* against the corporation, and also the embarrassment resulting from the use of summary proceedings against the auditing and disbursing officers of the city by its creditors for the purpose of enforcing the payment of their claims for money.

The object of the law makers was to remedy the existing evil by providing a more suitable mode for enforcing judgments against the city, and also by requiring that all suits against the city, "the object of which shall be, either directly or indirectly, to enforce the payment of money," to be brought in the ordinary form, and to prohibit the use of mandamus in such cases.

But the relator contends that if act No. 5 prohibits the writ of mandamus, it is superseded by section 40 of act No. 7, which gives that remedy, because the latter is part of a subsequent statute.

We do not find that section 40 of act No. 7 gives the remedy of mandamus; and if it did, it would be repugnant to act No. 5, which was approved on the seventeenth day of March, 1870, one day later than act No. 7. In case of conflict act No. 5 would govern.

But we do not see any conflict between the two statutes. Section 40 of act No. 7 may have full force and effect, and yet the relator may be prohibited, under act No. 5, to employ the writ of mandamus in his suit, the object of which is directly or indirectly to recover the money which he alleges the city owes him as holder of the police jury warrants.

If it be true that the warrants held by the relator are false and fraudulent, and were improperly issued, as the defendants aver, they are not valid liabilities of the city, and ought not to be included in the "full and correct statement of all the mature obligations of the city," which the statute requires the Administrator of Accounts to furnish, attested under oath, and which "shall be further approved by the Mayor and the Administrator of Finance."

If the relator's version of section 40 of act No. 7, that the writ of mandamus is authorized by it, be true, the city of New Orleans would be powerless to resist the collection of false, fraudulent or forged warrants produced against it. If such claims can be forced by mandamus into the "statement of all the mature obligations of the city," that statement itself would cease to be "a full and correct statement" of its mature obligations.

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It is not to be presumed that an interpretation leading to such disastrous consequences ought to be given to section 40 of act No. 7, an act itself to recharter the city, when that section is susceptible of a more enlightened and rational interpretation.

We believe that the "statement of all the mature obligations of the city" to be furnished and attested under oath by the Administrator of Accounts, and to be "further approved by the Mayor and Administrator of Finance," should embrace all warrants, certificates and other claims that these officers believe to be valid and binding upon the city.

This part of section 40 can not fairly be interpreted to mean, that it is the duty of these officers to attest under oath and approve of claims that are false and fraudulent, and which they believe are not justly owing by the city.

If all the warrants and other claims, whether just or not, are to be embraced in the "statement of mature obligations," what necessity is there for the solemn attestation of the Administrator of Accounts and for the "further approval of the Mayor and Administrator of Finance?"

We are far from believing that the law makers intended this as a mere idle ceremony. On the contrary, it seems to us to be a wise precaution to guard against the payment of false or forged warrants and other unjust claims.

Believing that these officers of the city are invested with reasonable discretion in furnishing the "full and correct statement of all the mature obligations of the city," which they are to attest under oath and approve, we think the writ of mandamus does not lie to compel them to embrace in the statement a claim which they do not believe to be valid and obligatory.

It is therefore ordered that the judgment appealed from be annulled, that the mandamus herein be disallowed, and that the petition of the relator be dismissed, with costs of both courts.

Rehearing refused.

No. 3415.—FRANK V. DESLONDE v. CHARLES LOZANO.

An action to contest the right to a parish office must be filed in the court having jurisdiction within ten days after the date of the election, otherwise the right is forfeited.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Barrow & Pope*, for plaintiff and appellant. *B. L. Lynch*, for defendant and appellee.

LUDELING, C. J. The plaintiff, who was a candidate for the office of sheriff at the general election held in November, 1870, contests the election of Charles Lozano, who was declared elected to said office by the returning officers of the State of Louisiana.

The election was held on the seventh of November, the proclamation

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of the returning officers was published on the fourth of December, and the petition of the plaintiff was filed on the thirteenth of December, in the year 1870.

The defendant filed a peremptory exception to this suit, averring, among other grounds of defense, that the petition was not filed within ten days after the election, and therefore that the right to contest the election is barred under the laws of this State. This defense was sustained by the district judge, and the plaintiff has appealed.

We think the judgment of the district court correct. The act of 1855, re-enacted in 1870, declares that "any candidate for either of the offices of the clerk of the district court, parish recorder, sheriff, coroner, justice of the peace, and any other parish officer that may be elected by the people, intending to contest an election, shall, within ten days after the election, file in the district court for the parish in which the election may have been held, a petition setting forth the facts on which he intends to contest the election."

It is clear that if this law was in force in November, 1870, the plaintiff's right of action was prescribed, unless the interpretation put by the plaintiff upon the clause, "within ten days after the election," be correct. He contends that the election was not over until the result of the election had been published by the returning officers, in this case the fourth of December, 1870; and that the ten days began to run only from that time, because until the proclamation of the returning officers had been made, the plaintiff could not know who was returned as elected. The plaintiff refers to the case of *Davis v. Maxwell*, 22 An. 66, to support his interpretation. The only question decided in that case was that the provisions of the act of the eighteenth of October, 1868, were prospective in their operations, and therefore could not regulate the proceedings to contest an election held in the month of April, 1870. The election was completed on the seventh day of November, 1870, in conformity to article 17 of the Constitution. Ascertaining the result and making proclamation thereof by the returning officers of the State formed no part of the election.

The act of the sixteenth of March, 1870, entitled "An Act to regulate the conduct and maintain the freedom and purity of elections, to prescribe the mode of making, and designate the officers who shall make the returns thereof," etc., does not repeal, by implication, section 1419 of Revised Statutes of 1870. We are unable to discover anything contradictory in the said laws. Neither have we been able to perceive why it was necessary that the publication of the result of the election by the returning officers of the State should be made before the plaintiff could file his suit to contest the election.

Section 53 of the act of sixteenth March, 1870, provides that "the supervisor of registration shall, *immediately* upon the receipt of each

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ballot box, note its condition and the state of the seals and fastenings thereof; and shall then in the presence of the commissioners of election and three citizens, freeholders of the parish for such poll or voting place, open the ballot box and count the ballots therein, and make a list of all the persons voted for, the number of votes for each person, the number of ballots in the box, and the number of ballots rejected and the reason therefor. The statement shall be made in triplicate, and each copy shall be signed and sworn to by the commissioner of the poll and by the supervisor of registration. As soon as the supervisor of registration shall have made the statement above provided for for each poll in his precinct or parish, and it shall have been sworn to and subscribed as above directed, the supervisor of registration shall inclose in an envelop of strong paper or cloth, securely sealed, one copy of such statement from each poll, and one copy of the list of persons voting at each poll, and one copy of any statements as to violence or disturbance, bribery or corruption, or other offenses specified in section nine of this act, if any there be, together with all memoranda and tally list used in making the count and statement of the votes, and shall send such package by mail, properly and plainly addressed to the Governor of the State. The supervisor of registration shall send a copy of said statement to the Governor of said State by the next most speedy mode of conveyance, and shall retain the third copy in his own possession."

Thus it is clear that if the supervisor of registration did his duty (and we are bound to assume that he did in the absence of proof to the contrary), the plaintiff had the means of knowing that he would not be returned as elected, and every act he complains of must have been as well known to him the day after the election as after the proclamation of the result made by the returning officers.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 2299.—MARCUS L. BELL, Trustee, v. J. R. POWELL.

A factor or commission merchant who resides in the city of New Orleans, who accepts a consignment from a person acting as trustee in a State where such titles are universally recognized, can not compensate the claim against himself for the proceeds of the articles consigned with a debt held by him against the person from whom the trust is derived.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Bradford, Lea & Finney*, for plaintiff and appellee. *Lacey & Butler*, for defendant and appellant.

LUDELING, C. J. During the year 1866, J. R. Powell, a cotton factor and commission merchant of New Orleans, furnished supplies and money for the cultivation of the crop on P. P. DeBosy Desit's planta-

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tion, situated in the State of Arkansas, and the latter promised to ship his crop to the former.

One J. J. Walstein held a judgment in the United States Circuit Court for the Eastern District of Arkansas against the said DeBosy Desits, and he was about to levy an execution upon the cotton and other property of said Desits, when it was agreed that a deed of trust should be executed upon the cotton crop then being picked, and estimated at one hundred and twenty bales, and supposed to be worth \$15,000. Accordingly, on the sixteenth day of October, 1866, DeBosy Desits executed a deed of trust to Marcus L. Bell upon one hundred and twenty bales of cotton on his farm, which said cotton was to be shipped and sold by the trustee, and out of the proceeds of sale eight thousand dollars were to be paid to the account of said Walstein on his claim of \$16,900 then due him by Desits; and it was further stipulated that after forty bales of cotton were consumed by the trustee, he should pay to DeBosy Desits, out of the next shipment, the sum of fifteen hundred dollars, to enable him to pay Jesse R. Powell for cash and goods advanced him. And it was agreed personally between DeBosy Desits and Marcus L. Bell that inasmuch as Desits owed Powell fifteen hundred dollars for cash and supplies advanced, the said Bell should ship to Powell, as a commission merchant, the cotton to give him the benefit of the commissions for selling.

In accordance with the agreement, Bell, trustee, shipped forty-eight bales of said cotton to Jesse R. Powell, which he sold for \$5670 06 net. Powell remitted to plaintiff, out of the proceeds of the forty-eight bales, the sum of \$4950, and having refused to pay the balance of the proceeds on the drafts of the trustee, Bell shipped the remainder of the cotton, nineteen bales, to other parties. Bell paid to DeBosy Desits \$1450 of the \$1500 which it was stipulated in the deed of trust that he should pay him to enable Desits to pay Powell, and the crop being smaller than was estimated, the trustee refused to pay him any more.

This suit is to recover from the commission merchant of the trustee the remainder of the proceeds of the sale of the forty-eight bales shipped to him.

The defense is substantially that Powell, a commission merchant, had furnished necessary plantation supplies and advanced cash to buy necessary plantation supplies to enable DeBosy Desits to make the cotton, to the extent of \$1724 08, and that it was agreed at the time the cotton was shipped that he should reimburse himself out of the proceeds, and that, expecting to get the whole crop, he had paid in error \$1004 more than was due by him, after deducting the advances made by him. He pleads compensation, and prays for judgment in reconvention for \$1004 against the plaintiff.

The question presented for decision, then, is whether a factor who

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accepts a consignment from a person acting as trustee, in a State where such titles are universally recognized, can compensate the claim against himself for the proceeds of the sale of the articles consigned with a debt held against the person from whom the trust is derived? We think not. Even if the cotton had been shipped by DeBosy Desits himself, the consignee would have been obliged to obey the instructions of the consignor in relation to the proceeds of the cotton consigned to him. 2 An. 27, *Bludworth v. Jacobs*; 6 An. 46, *Nolan v. Shaw*; C. C. 2207, 2927.

In his letter advising Powell of the first shipment of cotton, the plaintiff says: "Place cotton to my credit as trustee." Bell's title as trustee was perfect by the laws of Arkansas, where all the parties to the trust resided, and where the property which was the subject of the trust was situated. And the evidence in the record shows that all the stipulations of the deed of trust have been complied with, "so far as the cotton would go." It must be observed that the contract creating the trust was made with Desits, and not with Powell, and that the clause reserving \$1500, which was for the benefit of Powell, contained the stipulation that this sum was to be paid to Desits himself, who reserved the right to settle his accounts with Powell, and the evidence shows that \$1450 was paid to Desits, this sum being all that was left of the proceeds of the cotton.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

No. 3456.—STATE OF LOUISIANA ex rel. WEBER v. A. E. BILLINGS.

If a suit to test the right to an office be tried in chambers, legal notice must be given to the parties interested. Revised Statutes, section 2605.

A judgment rendered on default in a suit to test the right to an office, when the court is not in regular session, without giving the parties interested legal notice of the trial, is null and void.

APPEAL from the Eighth District Court, parish of Orleans. *Emerson*, Judge of the Third District Court, presiding in the Eighth. *Simeon Belden*, Attorney General, for relator. *C. S. Rice & W. R. Whitaker*, for defendant and appellant.

TALIAFERRO, J. William Weber alleging that he was duly elected Recorder for the Fourth District of New Orleans in April, 1870, and while exercising the functions of his office under a commission duly issued, he was forcibly ousted from and deprived of the said office by A. E. Billings, who has intruded himself into and illegally exercises the functions of recorder of said district. Judgment was rendered in favor of the complainant, and the defendant appealed.

The defense is that the proceeding taken by the complainant is null and without effect, having instituted it on the seventh of July, 1871,

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causing citation to be served on the fourteenth of that month, all during vacation of the court. No answer was filed. A judgment by default was taken, which, on motion, three days afterwards was made final.

Section 2605 of the Revised Statutes provides in cases of this sort that they may be tried in chambers or at a special term called by the judge, on legal notice being given the parties interested. The suit was instituted and judgment was rendered out of term time. The court before which it was brought was not in regular session. No special term was called as directed by law to try the case, and no legal notice was given to the parties interested.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed. It is further ordered that this case be remanded to the court of the first instance to be proceeded with according to law, the appellee paying costs of this appeal.

No. 1944.—AUGUSTUS W. WALKER v. ETIENNE VILLAVASO.

In a suit for damages on an injunction bond, if the record shows that the equitable remedy of injunction has been abused, and the administration of justice has been trifled with, then and in such case the court will assess against such party the highest damages allowed by law.

APPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. L. Madison Day and Sambola & Ducros*, for plaintiff and appellant. *C. Roselius & Alfred Philips*, for defendant and appellee.

LUDELING, C. J. This is an appeal from a judgment dissolving an injunction, being the *third* injunction which the plaintiff had obtained to prevent the execution of an order of seizure and sale, and it is the third time the case has been brought before this court. In the first instance the injunction was dissolved with damages; the second injunction was decreed to be in violation and contempt of the authority of this court, and therefore null, and a mandamus to the Judge of the Second Judicial District commanded him to cause the judgment of this court to be executed. During the temporary absence of that judge an injunction was again obtained to arrest the execution, or order of seizure and sale, on the grounds, substantially, upon which the second injunction had been obtained, and it was dissolved, with fifteen hundred dollars damages. The appellee has prayed for an amendment of the judgment by allowing the highest damages which the law allows. See 18 An. 712; 20 An. 521; 5 An. 648; 6 An. 471; 10 An. 734; 14 An. 333.

The evidence in this record shows that the equitable remedy of

injunction has been abused and the administration of justice has been trifled with by the plaintiff in this suit.

It is therefore ordered and adjudged that the judgment of the court *a qua* be amended so as to allow one thousand dollars special damages and twenty per centum on the amount of the judgment enjoined as general damages against the plaintiff and his security on the injunction bond *in solido*, and that as thus amended the judgment be affirmed with costs of appeal.

Rehearing refused.

No. 2264.—MERCHANTS' MUTUAL INSURANCE COMPANY v. LOUISIANA STATE MUTUAL INSURANCE COMPANY and THE CITIZENS' MUTUAL INSURANCE COMPANY.

A datien en paiement by an insolvent to one of his creditors with a view of giving an undue advantage or preference over the other creditors may be annulled at the suit of the other creditors, but in such case, if the debt for which the property has been given in payment be a just and valid claim, then and in that case he shall only lose the advantage endeavored to be secured by such contract.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & M. Voorhies*, for plaintiff and appellee. *G. Schmidt*, for defendant and appellee. *Johnson & Dennis*, for defendant and appellant.

TALIAFERRO, J. This suit is brought to annul a sale or *datien en paiement* made by the Citizens' Mutual Insurance Company on the eve of alleged insolvency, and for the purpose, as charged, of giving an undue preference to the Louisiana Mutual Insurance Company over their other creditors. It is shown that the Citizens' Mutual Insurance Company, being indebted to the Louisiana Mutual Insurance Company in the sum of \$7591, transferred to the latter six undivided fifty-eighth parts in ownership of the lot of ground and the New Orleans Opera House thereon situated, and four shares of the stock of the Valtte Dry Dock Company, for the release of their indebtedness, and for the further consideration of \$6000 in cash.

The plaintiff avers that this act of transfer or giving in payment is null for the reasons—

First—That the President of the Citizens' Mutual Insurance Company was without right or authority to alienate the real estate of the company.

Second—That the subsequent alleged ratification of the act is a nullity, because there was not a quorum of the directors present on the occasion, the meeting being irregular and informal, and without the proper notice.

Third—That for some time previous to this transaction the Citizens' Mutual Insurance Company was in a state of actual insolvency, a fact

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of which the pretended vendee was well aware. That the transfer of their property under those circumstances operates injuriously to plaintiffs, who are judgment creditors for a large amount of the Citizens' Mutual Insurance Company.

A judgment declaring a forfeiture of the charter of the Citizens' Mutual Insurance Company and appointing a liquidator was rendered by the Fourth District Court on the twenty-sixth December, 1867. This suit to annul was filed in the Fifth District Court on the tenth of March, 1868, and was transferred to the Fourth District Court and cumulated with the proceedings in insolvency.

The liquidator intervened in the action to annul, and prayed that judgment of nullity be rendered, and that the property sold be returned as assets of the insolvent for the benefit of the creditors. There was judgment rendered in favor of the plaintiff annulling the sale and decreeing the property to be sold forthwith at public auction, and from the proceeds that the sum of six thousand dollars be paid over to the Louisiana Mutual Insurance Company, and that that company be placed by the liquidator as an ordinary creditor for the sum of \$7591. From this judgment the Louisiana Mutual Insurance Company appealed.

We think there is no force in the first ground taken. By the fourth article of their charter, the Citizens' Mutual Insurance Company, the Board of Directors is to consist of thirteen members. The Board is vested with power "to make and adopt all necessary by-laws, rules and regulations for the government of the company and the transaction of its affairs," etc. The first article of the by-laws provides that five directors shall constitute a quorum for the transaction of business. The meeting which ratified the President's act was composed of five directors.

The sale or *datien en paiement* sought to be annulled was effected on the twelfth of September, 1867. The liquidator testified that the "company commenced to be in insolvent circumstances in the beginning of 1867; that the company went to protest on the ninth of September of that year; that the company up to the time he testified was perfectly insolvent. He knew the fact, because all the stocks of banks owned by the company were pledged to raise money, and every sixty days the note of the company was renewed. That the collections of premiums showed a material decrease in the affairs of the company. That there are acknowledged losses which the company had failed to settle, and he specified certain loans made to the company that remain unpaid.

The President of the Louisiana Mutual Insurance Company, as a witness in behalf of the defendant, states that he knew the Citizens' Mutual Insurance Company was in embarrassed circumstances at the

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time of accepting their proposition to transfer the property in question, but did not know that it was insolvent at that time. He admitted that he had heard of the protest before entering into the contract with the company, but that the secretary of the company had given him an explanation of the matter. He stated under cross examination that he knew the company was in embarrassed circumstances before the protest of its note, ninth of September.

The whole tenor of the evidence makes it clear to our minds that The Citizens' Mutual Insurance Company, at the time of its sale or giving in payment to the Louisiana Mutual Insurance Company of the property now in controversy and for some considerable time previous, was in failing and insolvent circumstances, and that the act was entered into with the view of securing an advantage in favor of the last named company. We are of opinion that article 1983 [1978] Revised Code is applicable to this case: "But if such fraud consisted merely in the endeavor to obtain a preference over other creditors for the securing of payment of a just debt, under circumstances in which by law the endeavor to obtain such preference is declared to be a constructive fraud, in such case the party shall only lose the advantage endeavored to be secured by such contract, and shall be reimbursed what he may have given or paid, but without interest, and he shall restore all advantages he has received from the transaction."

We think the judge *a quo* erred in ordering a sale of the property. If sold, it might not realize the amount to be refunded to the defendant, who is entitled to the full amount he gave. The decree must, therefore, be that the liquidator, acting for the creditors, pay over to the defendant six thousand dollars as a condition precedent to the return of the property as assets of the insolvent company.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed.

It is further ordered and adjudged that the sales and transfers made by the Citizens' Mutual Insurance Company to the Louisiana Insurance Company, viz: the one before Edward S. Gottschalk, on the twelfth of September, 1867, of the shares and interest in the New Orleans Opera House, and the other by H. Casterede of the stock of the Vallette Dry Dock Company, on the same day, be annulled and set aside; and that the said property, purporting to have been transferred by said acts, be restored to the liquidator of the Citizens' Mutual Insurance Company for the benefit of the creditors of said company, provided that thereupon or before the said liquidator in the interest of said creditors, pay to the Louisiana Mutual Insurance Company the sum of six thousand dollars, the plaintiff and appellee paying costs of this appeal, the Louisiana Mutual Insurance Company those of the court below.

Rehearing refused.

No. 3334.—CITY OF NEW ORLEANS v. A. W. WALKER.

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123	861

A defendant who appears for the purpose of excepting to the jurisdiction of the court, and at the same time enters the plea of *lis pendens*, can not be heard to urge the plea of want of citation. 21 An. 438.

The court having jurisdiction of the property taxed has jurisdiction to enforce the collection of the taxes.

The plea of *lis pendens* will not be sustained when the thing demanded in the two cases is not the same.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. H. H. Walsh*, for plaintiff and appellee. *John S. Tully*, for defendant and appellant.

LUDELING, C. J. This is a suit to enforce the collection of \$760 taxes due to the city of New Orleans. The defendant appeared and excepted to the jurisdiction of the court on the ground that he is a resident of the parish of St. Bernard. He further averred, in case this exception should be overruled, that his name and surname has not been stated in the list published, which is to stand in lieu of a citation; and he still further pleaded *lis pendens*.

A want of citation is cured by the appearance of defendant in the suit for any other purpose than to allege the want of citation. 21 An. 438, *City of New Orleans v. Hall*.

The tax claimed is an assessment upon real and personal property situated within the corporate limits of the city, and is exigible in the courts within said city.

The plea of *lis pendens* is not well founded. The thing demanded in the two cases is not the same.

It is therefore ordered that the judgment of the district court be affirmed, with costs of both courts.

No. 3538.—NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY v. FRANCOIS BOUGERE.

In a proceeding for the expropriation of private property for the use of a railroad corporation the plaintiff is entitled to notice of the award of the commissioners, in order that it may show that the award is extortionate in amount. In such a case, a judgment that has been rendered on the report of the commissioners, without giving notice to the railroad company, will be reversed on appeal and the case will be remanded for service of the rule and for further proceedings according to law.

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Beauvais, J. John H. Ilsley, Jr.*, for plaintiff and appellant. *E. Filleul*, for defendant and appellee.

TALIAFERRO, J. This is a suit for the expropriation of property. Proceedings purporting to have been taken under the provisions of an act of the Legislature, approved nineteenth of August, 1868, are shown by the record. We find that a judgment was rendered in con-

formity with the report of commissioners appointed to assess the damages sustained by the defendant, who seems to have acquiesced in the decree of the court. But the plaintiff appealed, and he complains that after the report of the commissioners was returned he was allowed no opportunity to oppose it and show that the award rendered by the commissioners is excessive and exorbitant in amount. This allegation seems to be sustained by the evidence in the record. The commissioners' report was filed in court on the seventh of March, 1871. On the third of April, the plaintiff's attorney being absent, an order was rendered, on motion of the defendant's counsel, fixing the cause for trial on the sixth of April. On that day a rule was taken on the plaintiff to show cause why the report of the commissioners should not be homologated. Nothing shows that the plaintiff had notice of the rule in any manner. An order was rendered on the same day, making it absolute, and the judgment thereupon was rendered.

We think the proceeding irregular. Having taken a rule upon the plaintiff to show cause why the report of the commissioners should not be made the judgment of the court, it was incumbent upon the defendant to have it served upon the plaintiff that he might interpose objections, if he had any.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed.

It is further ordered that this case be remanded for service of the rule to show cause and for further proceedings according to law, the defendant and appellee paying costs of this appeal.

LIST OF CASES NOT REPORTED.

NEW ORLEANS.

- No. 2998.—Charles Kummell *v.* E. Libermann. J. H. Wiley, Intervenor.
- No. 2017.—Thomas Robertson, Executor, *v.* E. R. Wagener.
- No. 2012.—C. W. Sanford *v.* Arthur Stone & Co.
- No. 2018.—State *ex rel.* Towne *v.* Judge of Thirteenth Judicial District.
- No. 2168.—State *ex rel.* Montieu, *v.* F. Lagroue. State, *ex rel.* Moody, *v.* George McD. Madare.
- No. 2169.—State *ex rel.* Leeche *v.* J. J. Kreeder.
- No. 2174.—David J. Elder *v.* Stevenson & May.
- No. 2903.—State *ex rel.* Towne *v.* Judge of Thirteenth Judicial District.
- No. 2185.—Thomas Robertson *v.* E. R. Wagener.
- No. 2179.—John L. Sterry *v.* Thomas G. Noel.
- No. 1933.—Paul Tulane *v.* C. Yale, Jr., & Co
- No. 2241.—Succession of L. A. Kendall.
- No. 2517.—State *ex rel.* S. Belden, Attorney General, *v.* Markey, Kaiser et al.
- No. 2211.—L. H. Gardner & Co. *v.* Wallace & Co.
- No. 1996.—Justin Cachna *v.* J. A. Canteron.
- No. 3882.—State *ex rel.* Cheevers et al. *v.* Gabriel Chelsey.
- No. 2643.—Succession of Tompkins *v.* Succession of DeGriffin.
- No. 3213.—Berenger & Co. *v.* Openheimer et al.
- No. 3178.—Stephen K. Fowler *v.* Andrew S. Ruth, Administrator.
- No. 3264.—Heirs of B. A. Landry & Co. *v.* Auguste Levert, Sr., et al.
- No. 2654.—State, *ex rel.* Train, *v.* Auditor and Treasurer.
- No. 3185.—N. O. Connor *v.* Police Jury of Pointe Coupee.
- No. 3204.—Ar. Miltenberger *v.* James Houston and Wife.
- No. 3165.—Succession of Scoffie.
- No. 2725.—T. G. Davidson *v.* B. F. Taylor.
- No. 3227.—Thomas J. Swofford *v.* Maria J. Dupray.
- No. 2214.—Reeve, Case & Co. *v.* Atlantic Fire Insurance Company.
- No. 3031.—State *ex rel.* Cheevers et al. *v.* P. G. Smith.
- No. 3183.—Pierre Aillet *v.* James C. Woods.
- No. 3252.—Henriette Bodin *v.* Mary F. Carter.
- No. 2227.—Charles Case, Receiver, *v.* John W. Cannon and D. McCan.
- No. 3107.—L. F. Barrett *v.* F. C. Mahan.

- No. 1879.—Sheridan, Poole & Co. *v.* Robert Pitkin.
No. 3288.—State of Louisiana *v.* Merchants' Bank.
No. 2707.—Succession of Watterston.
No. 3180.—L. Talbot and Husband *v.* C. Picori and Husband.
No. 3275.—State of Louisiana *v.* Mechanics' and Traders' Bank.
No. 2228.—Charles Case, Receiver, *v.* J. W. Cannon.
No. 1723.—P. Malochee, Agent, *v.* W. F. McLean.
No. 2280.—M. Kaufman & Co. *v.* William Golding.
No. 2275.—Stauffer, Kent & Co. *v.* Healy & Asbury.
No. —.—Vinas *v.* Merchants' Insurance Company.
No. 2224.—Armand Belot *v.* City of New Orleans.
No. 2147.—Widow de St. Romes, Victor de St. Romes subrogated, *v.*
Mrs. William Fanny Blanc et al.
No. 3296.—City of New Orleans *v.* Factors' and Traders' Insurance
Company.
No. 3295.—City of New Orleans *v.* Crescent Mutual Insurance Company.
No. 3294.—City of New Orleans *v.* New Orleans Mutual Insurance
Company.
No. 3293.—City of New Orleans *v.* Louisiana Mutual Insurance Com-
pany.
No. 1527.—Azemia Shepherd *v.* John R. Witherly & Co.
No. 1528.—Azemia Shepherd *v.* Hugh Montgomery et al.
No. 1530.—Shepherd Brooks *v.* John R. Witherley et al.
No. 2229.—V. J. Decaux *v.* H. Miller.
No. 2244.—Southmayd *v.* Forain.
No. 2284.—Henderson & Peale *v.* James A. Jackson.
No. 2283.—Gardere *v.* St. Romes.
No. 2252.—Geddes, Shakspear & Co. *v.* E. M. Ivens & Co.
No. 2858.—J. Kohn *v.* J. T. Michel et al.
No. 2304.—J. J. Monfort *v.* T. Lafon.
No. 2261.—Masters and Wardens *v.* Bark Francisco.
No. 3209.—Stewart, Hyde & Co. *v.* Mrs. Luzette Buard et al.
No. 3329.—State *v.* Union Bank.
No. 3241.—Henry Hine *v.* H. L. Losce et al.
No. 2309.—Succession of Ibos.
No. 2298.—J. S. Wiens *v.* Giffin & Co.
No. 2240.—J. Christen *v.* D. Thorner.
No. 2302.—Succession of J. J. Slade.
No. 2386.—W. J. McLean *v.* Foster Elliott et al.
No. 2347.—Theenman & Co. *v.* Redmond & Co.
No. 2066.—Succession of Victor Roumage.
No. —.—Burtio Vinas *v.* The Merchants' Mutual Insurance Company.
No. 1220.—City of New Orleans *v.* A. Robert.
No. 3447.—John C. Bach *v.* W. A. Hawthorn.
No. 2404.—McPhelin, Administrator, *v.* John Askew et al.

- No. 2407.—H. Bezou, Commissioner, etc., *v.* Citizens' Bank.
No. 1347.—City of New Orleans *v.* F. M. Fisk.
No. 3363.—City of New Orleans *v.* O. M. Redon et als.
No. 3218.—Ed. Nalle *v.* Mrs. Caroline Carter.
No. 2360.—Mrs. Reine Wetham *v.* Robert Moore & Sons.
No. 3348.—Hannah Strickland *v.* E. J. Gayle et al.
No. 2859.—Isaac Klein *v.* Crescent City Railroad Company.
No. 2409.—Germania National Bank *v.* E. E. Whitney et al.
No. 3364.—City of New Orleans *v.* O. M. Redon.
No. 3365.—City of New Orleans *v.* O. M. Redon.
No. 2361.—P. R. Mahen *v.* Reiman & Friedlander.
No. 2418.—W. H. Pemberton *v.* Taliaferro Wells et al.
No. 2429.—Sandford & Black *v.* Oliver Elsworth et al.
No. 499.—Bertrand Saloy *v.* J. O. Peyroux.
No. 3059.—Succession of Beebe.
No. 2266.—Metropolitan Insurance Company *v.* Baker et al., owners
steamer Henry Ames.
No. 3469.—C. E. Merril *v.* Police Jury of Iberville.
No. 3442.—State ex rel. McKnight *v.* Judge Sixth District Court, parish
of Orleans
No. 2346.—Joseph R. Anderson *v.* Union Bank of Louisiana.
No. 3566.—Fisher, Johnson & Co. *v.* Sizer & Owen.
No. 2318.—Meyers & Winhill *v.* Sun Mutual Insurance Company
No. 2374.—Frank B. Green *v.* G. L. Laughland.
No. 3522.—A. Miltenberger & Co. *v.* A. W. Walker.
No. 3535.—New Orleans, Mobile and Chattanooga Railroad Company
v. Chauvin, Levois & Co.
No. 3599.—State ex rel. S. Belden, Attorney General, and George E.
Bovee *v.* F. J. Herron.
No. 3600.—State ex rel. Isadore Newman *v.* James Graham, Auditor.

OPELOUSAS.

- No. 764.—Monford Wells *v.* T. G. Compton.
No. 745.—Succession of Kobleur.
No. 742.—William Muirheid *v.* F. E. Piquette.
No. 747.—Laas *v.* Carlin

MONROE.

- No. 254.—Walsh & Boisseau *v.* Finley & Hayes.
No. 259.—M. L. Baker *v.* Elstner, Kingsworthy & Co.
No. 185.—Walker & Vought *v.* G. W. Kimbrough, Administrator.
No. 202.—Surghnor & Mullin *v.* M. E. Nunnallel.
No. 251.—McCutchen & Co. *v.* O'Neal et al.
No. 256.—Harper *v.* Hope, Sheriff, et al.
No. 225.—H. Block & Co. *v.* Varner & Bridger.

No. 189.—*Oliver & Byrne v. S. M. Turrentine.*

No. 237.—*Low & Whitney v. Thompson Scott.*

No. 260.—*Hall v. Mackler.*

No. 145.—*City of Shreveport v. J. H. Reynolds, Curator.*

No. 221.—*A. Miltenberger v. J. H. Callaway.*

No. 218.—*Joseph Hoffman v. North Louisiana and Texas Railroad Company.*

No. 248.—*M. D. Tally, Administratrix, v. Gillis & Ferguson.*

No. 213.—*Barrett & Lessassier v. G. W. McGinty.*

No. .—*William A. Murphy v. Chancey Lewis.*

No. 273.—*Stoner & Paterson v. John Dickinson et al.*

No. 267.—*J. N. Evans v. C. M. Pegues, Curator.*

No. 128.—*Stewart v. Levy.*

No. 275.—*State v. Hunsecker et al.*

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ABSENTEE.

SEE ATTACHMENT—*Lyons v. Dymond*, 434

Spalding & Rogers v. Walden, 474.

ACCOUNT.

1. In an action on account for work and labor performed under an agreement, the objections by the defendant that it was not done within the time specified, and was not satisfactorily done, comes too late if not made until after the work has been done.

Lyons v. Dymond, 709.

2. An account closed and acknowledged is only prescribed by ten years. One witness is sufficient to prove an account aggregating an amount above five hundred dollars, if no one item of the account exceeds that sum.

Betzer v. Coleman, 785.

ACTION.

1. When one joint owner of a plantation remains on and cultivates a portion of the land not exceeding one-half, the other joint owner who does not choose to occupy the plantation, or any portion thereof, in the absence of a lease or agreement to pay rent, has no right of action against his joint owner who has cultivated a portion of the land for the rent thereof. Nor has the joint owner who cultivated a portion of the land any right of action or legal demand against his joint owner for improvements or repairs made on the place to aid him in securing his crop.

Becnel v. Becnel, 150.

2. Real property in possession of a party, under a recorded title translativ of property, can not be seized by a judgment creditor of the former owner, unless it be shown that the sale was simulated. The question, whether the judgment under which the sale was made, is null because it was revived on insufficient evidence, and whether the sale is null because the sheriff failed to observe all the forms of law in making the seizure, etc., can not be inquired into, collaterally, by a judgment creditor who has caused the property to be seized without any reference to the sale. Such questions can only be examined in a direct action brought to annul the judgment or the sale made under it.

Anderson v. Carroll, Hoy & Co., 175.

3. An action to contest the right to a parish office must be filed in the court having jurisdiction within ten days after the date of the election, otherwise the right is forfeited.

Deslonde v. Lozano, 794.

SEE PETITORY ACTION.

ADMIRALTY.

1. The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction. Constitution of the United States, section second, article third.
Southern Dry Dock Company v. The Steamboat J. D. Perry, Captain A. Baird and Owners, 39.
2. The District Courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. Act of Congress, September 24, 1789. *Ib.*
3. A proceeding by provisional seizure, authorized by State law, when taken out against a vessel of a foreign port, while lying in a port of this State, to enforce a claim for repairs made and materials furnished at the foreign port, is a proceeding *in rem* or in admiralty, and the State courts are without jurisdiction. *Per curiam*: A distinction must be taken between a lien on a vessel at the home port for materials furnished and labor done in repairing her, and the lien for the same, when the vessel is found in a foreign port. In the former case no admiralty lien exists in favor of the builder or furnisher of materials, and the local jurisdiction attaches. But in the latter case an admiralty lien exists, and the State courts are without jurisdiction to enforce it. The form of the writ or proceeding, provided by the local law, is immaterial, if the object sought is to enforce an admiralty lien. *Ib.*
4. In a case like this, however, where the master has been cited personally, and is sought to be made liable in his individual capacity, the State courts, while they are without jurisdiction to proceed *in rem* by provisional seizure, have jurisdiction of the personal action. *Ib.*

ADMINISTRATORS.

SEE EXECUTORS AND ADMINISTRATORS

AFFIDAVIT

1. An affidavit, though legal in form, is void if it be shown that the affiant was not sworn by an officer competent to administer oaths.
Barrow v. Richardson, 203.
2. If it be shown that the party claiming the injunction was not present and did not take the oath, as certified by the clerk who issued the writ, it will be dissolved and set aside, because no affidavit has been made, as required by law. *Ib.*

AGENT AND AGENCY.

1. In a suit for interdiction, the defendant, who is charged with insanity or mental unsoundness, must be notified in person. He can not be cited through a *curator ad hoc*. 16 L. 67.
Gernon v. Dubois, 26.

AGENT AND AGENCY—Continued.

2. The mere application to have a person interdicted does not revoke or in anywise affect a power of attorney given by him. *Ib.*
3. An agent, holding a full power of attorney to do everything in relation to the property and rights of his principal which occasion may require, may represent his principal in a demand against a succession of which he (the agent) is a co-executor. *Ib.*
4. A, the judgment creditor of B, caused a lot of tobacco in a warehouse to be seized as the property of his debtor. C, a third party, intervened and claimed the property. The facts elicited on trial show that B was the agent of C; that he had offered to sell the tobacco, and pointed it out to two brokers for that purpose; that A, being present when it was offered for sale as B's property, caused it to be seized. *Bostick & Seymour v. Shannon, 35.*
5. C, the intervenor, showed a bill of sale of the tobacco, the warehouseman's receipt, and the authentic act constituting B her agent. Held—That the evidence of the brokers that B engaged them to sell the tobacco, which was pointed out to them in the warehouse as B's property, was insufficient to overthrow the title of C, as established by the bill of sale and the warehouseman's receipt; that the agent was under no obligation to disclose his capacity to the brokers, when he applied to them to have the property sold. *Ib.*
6. The same person can not be the agent of two parties in the same transaction, when their interests are conflicting nor when the agent has a personal interest in the transaction averse to either of them. Therefore, if a party has signed an obligation as surety for another, who afterward dies before its payment, and the surety becomes the administrator of his estate under appointment by the court, and by an agreement with the heirs he is appointed to compromise and pay the debts of the succession, such person, holding representative positions of different parties who have opposing interests in the succession, can not represent them both in a compromise with one of the creditors of the succession he represents. *Draughon v. Quillen, 237.*
7. The transferee of a judgment against a succession, who holds it by virtue of a transfer made by the agent of the heirs and administrator of the estate, which said agent acquired the judgment by compromise with the creditor, can only recover from the succession, on such judgment, the amount which the agent and administrator paid the judgment creditor for it. *Ib.*
8. An agent's authority to sign a promissory note for his principal must be express and special, and on the trial of the case under the general issue the burden of showing the agent's authority to sign the note falls on the holder. *Barriere v. Fortier, 274.*

AGENT AND AGENCY—Continued.

9. A procuration or power of attorney which does not specify the time at which the agency is to terminate, leaves it discretionary with the principal to discharge the agent at pleasure. The agent can not, therefore, maintain an action against his principal in damages for a breach of contract in having discharged him at any particular time, if good cause is shown. *Jacobs v. Warfield*, 395.
10. Messrs. Walton & Deslonde, brokers, contracted with the New Orleans, Jackson and Great Northern Railroad Company to cause to be released from the custody of the United States authorities, and to sell or procure a purchaser for at a given price, a certain piece of property on Camp street, for which they were to receive five per cent. commission, or two and a half per cent. commission if they failed to procure a purchaser. They succeeded in getting the property released, for which they were paid two and one-half per cent. commission as agreed upon. Subsequently other brokers were employed, who negotiated a sale of the property, for which they were paid a commission. Walton & Deslonde now bring suit for the additional two and one-half per cent. commission on the gross sale, under their contract, alleging that the sale was taken out of their hands without their consent. The evidence shows that after several months delay, they failed to procure a purchaser on the terms and conditions prescribed by the company. Held—That the first brokers, Walton & Deslonde, not having complied with the terms and conditions of the latter part of their obligation, by effecting a sale of the property or procuring a purchaser at the price and on the terms and conditions agreed upon, they are not entitled to recover the commissions therefor.

Walton & Deslonde v. New Orleans, Jackson and Great Northern Railroad Company, 398.

11. A principal who sues his agent for a balance alleged to be due him, and also makes a third party a party to the suit, on the allegation that certain notes which had been purchased by his agent with funds intrusted to the agent, and by him transferred to said third party, must show as matter of fact, before he can recover the notes of such third party, that the notes were purchased by the authority of his principal with his funds, and also that the third purchaser of the notes from the agent knew the fact at the time of the transfer.
12. An agent engaged in the purchase of cotton must account to his principal for the full quantity that he has purchased.

Carrere v. Labau, 532.

Skannall v. Stevenson, 755.

APPEAL.

1. In a case where the transcript of appeal is incomplete on account of the record not containing the evidence offered on trial in the court *a qua*, and the fault is not imputable to the appellant, the cause will be remanded for a new trial *de novo*.

Martinez v. The New Orleans City Railroad Company, 28.

APPEAL—Continued.

2. The application of a party to remove a cause to the next Circuit Court of the United States is analogous to a plea to the jurisdiction of the State court, and, when granted, the party against whom it is taken has the right to appeal. The case would be different if the application to remove is refused by the court *a qua*. In the latter case no irreparable injury would follow, and the appeal would not be allowed. *Rosenfield v. Adams Express Company*, 21 An. 233.

State ex rel. Coons v. The Judge of the Thirteenth Judicial District, 29.

3. A mandamus will therefore issue, on application, from the Supreme Court directing the judge of the district court to grant an appeal from an order transferring a cause to the Circuit Court of the United States, if the case is in other respects appealable. *Ib.*
4. A motion to dismiss an appeal which is founded on the want of a legal right to the appeal, may be made at any time. It is only such motions as go to the irregularity of bringing up the appeal that must be made within three judicial days from the filing of the transcript in the appellate court.

James v. Fellows & Co., 37

5. After the appeal has been granted and the bond has been filed, the court *a qua* is without jurisdiction to examine whether the appellant has acquiesced in the judgment, and therefore not entitled to the appeal. In such a case, the appellate court being vested with jurisdiction of the appeal, and the court *a qua* being divested of jurisdiction over the case, the motion to dismiss, on the ground of acquiescence in the judgment, must be made in the appellate court, and if the fact of acquiescence do not appear in the record, the case will be remanded, with instructions to the judge *a quo* to take evidence on and try the question of acquiescence in the judgment appealed from. *Ib.*
6. In this case an injunction was granted restraining the city of New Orleans from destroying or removing the Pontchartrain Railroad depot. The city obtained an order dissolving the injunction on bond. The railroad company asked for an appeal from the order dissolving the injunction on bond, which the court *a qua* refused, on the ground that no irreparable injury would follow. Held by the Supreme Court—That the allegations in the petition for injunction being taken as true, an irreparable injury would follow, because the company would, in case it was decided in their favor, be driven to another action on the bond to obtain their rights; that an appeal would lie in all cases from an interlocutory decree where an irreparable injury would follow.

State ex rel. Pontchartrain Railroad Company v. Judge of Eighth District Court, 51

APPEAL—Continued.

7. If the appellee be cited in his individual capacity, when he occupies only a representative capacity in the suit, the fault is imputable to the appellant, and the appeal will be dismissed on motion.
Tutorship of the Minor Osborn, 178.
8. Citation of appeal must be served on the appellee, if he resides in the State. C. P. 582. The appellee who resides in the State can not be made a party to the appeal by service of citation on the attorney.
Jeffrey v. Phillips, 207.
9. An interlocutory decree, ordering interrogatories against a garnishee in an attachment suit to be taken for confessed, is not appealable until final judgment has been pronounced in the main action. A writ of mandamus will not, therefore, issue from the Supreme Court directing the judge *a quo* to grant an appeal from such interlocutory order.
State ex rel. Schooler v. Cooley, Judge, 213.
10. No appeal lies from a judgment until it is signed by the judge.
Tietgens v. Kemper, 219.
11. No appeal is allowed from the parish court to the Supreme Court except in probate matters where the amount involved is above five hundred dollars.
Irving v. Gaines, 236.
12. The appeal will be dismissed if taken from a judgment that is not signed by the judge, notwithstanding the parties have filed a written consent thereto, because no appeal will lie from a judgment until it is signed by the judge, and the consent of the parties will not cure this omission.
Bird v. Bird, 262.
13. The heirs of an estate who apply by petition for an appeal from a judgment in favor of a creditor against the estate, must make the estate a party appellee. Otherwise the appeal will be dismissed on motion for want of proper parties.
Miltenberger v. Pipes, 267.
14. Several appeals from different judgments, rendered in a settlement of a succession, may be cumulated in one record, if all the parties interested enter into an agreement to that effect. In such a case, if the bonds given in such case are sufficiently identified with the judgments from which appeals have been granted, and the respective amounts correspond with the amounts fixed by the order of the court in each case, and be signed by the proper parties, the appeals will not be dismissed for irregularity. A judgment homologating an administrator's account and tableaux, before the lapse of ten days after citation, is a nullity.
Succession of Cordeviolle, 297.
15. An appeal will lie from an interlocutory decree dismissing a rule taken to dissolve an injunction which has been granted to stay proceedings by executory process, if the petition for injunction puts at issue the validity and correctness of the order of seizure.

APPEAL—Continued.

itself. In such a case an irreparable injury might follow, and an appeal will therefore lie. *Marrero v. Barker*, 302.

16. An application to the Supreme Court to extend the time fixed in the order of appeal by the lower court is without effect if not made within three judicial days after such return day.

Redmond v. Mann, 373.

17. After the right of appeal has lapsed through the fault or negligence of the appellant, the Supreme Court can not legally take cognizance of the appeal. *Ib.*

18. The order of the Supreme Court granting an extension of time to the appellant to bring up the appeal, has no effect if the return day has expired before the application for the extension of the time is made to the court. *Succession of Bergold*, 374.

19. Where a case involving the right to office is tried in chambers, and an appeal is taken by motion in open court, citation of appeal is not necessary. *State ex rel. Ard v. Bankston*, 375.

20. If the appeal bond embraces all the parties necessary to the appeal, the fact that the order of appeal fails to set out the proper parties is not good cause for dismissing the appeal. *Ib.*

21. The failure of the order of appeal to fix a return day is not good cause for dismissing the appeal, because the fault is not attributable to the appellant. *Ib.*

22. The fact that the transcript was not filed until fifteen days after the judgment of the court below, in suit involving a contest for office, does not lay the foundation for a motion to dismiss the appeal. *Ib.*

23. No appeal lies from a judgment not signed by the judge *a quo*. *Succession of Millaudon*, 400.

24. A motion to dismiss the appeal for informalities in the appeal bond, comes too late if not made within three judicial days from the filing of the transcript. *Kohn v. Davidson*, 467.

25. If prescription has not been pleaded, it will not be noticed by the court on suggestion in argument. *Edwards v. Harrison*, 473.

26. If the appeal was taken for delay only, damages will be allowed the appellee as for frivolous appeal. *Ib.*

27. An appeal from a judgment removing a testamentary executor from office will be dismissed, if it appear that the plaintiff in the proceeding in the lower court has not been cited, nor made appearance in the appellate court. *Morgan v. Morgan*, 502.

28. The voluntary payment of a judgment or a portion thereof, destroys the right of appeal. *James v. Fellowes*, 523.

29. If it appear that the judgment appealed from has been declared an absolute nullity by the court *a qua* on account of its having been rendered and signed in vacation, the appeal will be dismissed *ex officio*. 21 An. 306. *Ib.*

APPEAL—Continued.

30. A judgment homologating an administrator's account so far as not opposed, becomes final if not appealed from within the delays allowed by law. If, therefore, an appeal has been taken from a judgment rendered on the items of the account which have been opposed, after the time has elapsed for taking an appeal from the judgment on the items not opposed, the appellate court can not inquire into the correctness of the judgment on the items not opposed, because the judgment has become final

Succession of Mouton, 527.

31. The appeal will be dismissed *ex officio*, if no order of appeal has been granted by the judge *a quo*. An agreement of counsel entered on the minutes of the court, before judgment, giving to either party to the suit a devolutive or suspensive appeal from such judgment as may be rendered by the judge who has taken the case under advisement, has no legal effect whatever as an order of appeal from the judgment.

Dupre v. Mouton, 543.

32. The acknowledgment in writing of service of citation of appeal by the attorneys of the appellee, who is a non-resident, proves a legal service of citation of appeal.

Payne v. Ferguson, 581.

33. The allegation in the petition of appeal that the appellant is a judgment creditor of the succession to an amount above five hundred dollars, with a certified copy of the judgment annexed, is sufficient to establish an appealable interest from a judgment ordering the sale of the property.

Ib.

34. The right of appeal is secured not only to all parties in the suit, but to third persons when they are aggrieved by the judgment, if the amount involved is sufficient to give the appellate court jurisdiction. C. P. 571. When, therefore, the State Auditor and State Treasurer are made parties defendants in a suit to compel them to register bonds of the State which have been authorized by law in favor of a railroad company, which registry by these officers is required by law as a prerequisite to their delivery to the company, and the judgment of the court requires them to make such a registry, then and in such case they or either of them have the right of appeal from such judgment secured to them, if the bonds sought to be registered are sufficient in amount to give the appellate court jurisdiction, and a mandamus will issue, on application of the Auditor and Treasurer, or either of them, from the Supreme Court, directing the judge *a quo* to grant the appeal.

State ex rel. James Graham, Auditor, v. The Judge of the Eighth District Court, Parish of Orleans, 595.

35. If the appeal has been taken and filed in the appellate court, notwithstanding it has been dismissed by the judge *a quo*, on the

APPEAL—Continued.

ground that the surety on the bond is not good, then and in such case the appeal will be dismissed on motion for want of a bond.

Huppenbauer v. Durlin, 739.

36. An appeal from the verdict of a jury and the judgment thereon will be dismissed on motion if the note of evidence shows that no documents were filed in evidence nor testimony in writing on the trial, and statement of facts or assignment of errors are found in the record.

Lockwood v. Zuntz, 746.

37. An appeal will lie from a judgment either annulling or affirming an ordinance of the City Council, if the amount involved in the ordinance by way of contract exceeds in amount the sum of five hundred dollars, notwithstanding there may be several parties to the contract on the one side, no one of whom may have an interest therein equal to five hundred dollars. In such a case a mandamus will issue, on application, to the judge *a quo*, directing him to grant the appeal.

State ex rel. Murtagh v. Judge of the Eighth District Court, 761.

38. A third party who shows an interest in a suit in amount sufficient to give the appellate court jurisdiction, may appeal from such judgment, and a mandamus will issue from the Supreme Court, on application of such third party, directing the judge *a quo* to grant the appeal.

State ex rel. Byerly v. The Judge of the Eighth District Court, Parish of Orleans, 763.

APPEAL BOND.

1. The judgment of the court below setting aside a suspensive appeal on the ground that the surety on the bond is not good and solvent, will be reviewed by the Supreme Court on an application for a writ of prohibition, and if the surety is found to be good, the writ of prohibition will issue. A surety on the appeal bond need not show that he possesses real estate to an amount sufficient to cover the bond, nor need he show that he will be worth the amount of the bond at the time it becomes exigible. It is sufficient for him to show that he is worth in personal property, over and above his liabilities, an amount above that of the bond at the time of signing it.

State ex rel. Kane v. Judge of Seventh District Court, 279.

2. If the appeal be granted on motion and the bond be given in favor of the clerk, all persons having an interest are by law parties to the appeal. If, therefore, the executor has a right to appeal in any capacity, the appeal taken by him will not be dismissed on motion of the legatees, who have not appealed, on the ground that the executor had no right to take an appeal for them.

Succession of McKenna, 369.

APPEAL BOND—Continued.

3. An executor who is directed to administer the estate in conformity to the dispositions of the will, has an appealable interest from a judgment recognizing the rights of the survivor in community. The appeal taken by the executor from such judgment will not, therefore, be dismissed for want of appealable interest. *Ib.*
4. A judgment is prescribed within ten years from its rendition under the act of 1853. The fact that a case was several years pending on appeal does not prevent the plaintiff from reviving the judgment. Unless revived in the manner indicated in the statute, it may prescribe pending the appeal, in case ten years elapses from the date of the signing of the judgment. If the judgment be prescribed for want of revival within ten years, the surety on the appeal bond is discharged. Where the debt intended to be secured by the appeal bond is discharged by prescription, the judgment debtor, the principal obligor, is released. Therefore the surety on the appeal bond of that obligor is also discharged.
Byrne v. Garrett, 587.
5. After the appeal bond has been given and filed in the record, the jurisdiction of the appellate court attaches, and the jurisdiction of the court *a qua* over the case is limited to the inquiry as to the solvency of the security on the bond. If a rule be taken by the appellee before the judge *a quo* to set aside the appeal on the ground that the surety is not good and solvent, the Supreme Court will, on application for a writ of prohibition, examine the evidence taken in the court below on the rule to set aside the appeal.
State ex rel. Lynch v. Judge of the Second Judicial District, 714.
6. The failure of the appellant to qualify the surety on the appeal bond will not authorize the judge *a quo* to dismiss the appeal, but the writ of prohibition, and not that by mandamus, is the proper remedy for the appellant in such a case. *Ib.*

ATTACHMENT.

1. The sale by an absentee of a part interest in a steamboat, to a resident of the State, will not defeat the right of attachment which the creditor had against the boat for a debt which the absentee had contracted before the sale; the right of the creditor to the writ of attachment against the boat being in no wise impaired by a sale of a part thereof to a resident of the State, who was afterwards taken into the firm as a commercial partner. *Stevenson v. Prather, 431.*
2. In a forced sale of an absentee's property under an attachment process, in 1862, while Confederate notes were a circulating medium, the absentee will be presumed not to have consented to the sale of his property in such unlawful currency; and in case it has been subsequently determined that the absentee should receive the price of the sale, the sheriff who made the sale and received the

ATTACHMENT—Continued.

price, can not be permitted to set up in defense to its payment that the sale was made for and the price received was in Confederate notes, and that he, the sheriff, could not be compelled to pay any other than such currency as he had received. In such a case the presumption is the other way; that is, that the absentee did not sanction or approve the sale of his property for unlawful currency.

Spalding & Rogers v. Walden, 474.

3. Where several writs of attachment have issued from inferior jurisdictions, each for an amount less than that required to give the District Court jurisdiction, and the sheriff levies upon and seizes a certain piece of property, or a lot of cotton, all of which is claimed by a third party, if the value of such cotton thus attached by virtue of the several writs amounts to a sum above five hundred dollars, then and in such case the ownership of the cotton being the question at issue, the District Court has jurisdiction.

McFarland v. Kuss, 608.

ATTORNEYS AND ATTORNEYS' FEES.

1. An attorney at law is entitled to be paid a fair compensation for his services by the party who employs him in a litigation. If by compromise between the plaintiff and defendant, after judgment, the defendant agrees to pay the counsel fees of plaintiff in the case, such agreement is not binding on the attorney, and he may, notwithstanding the agreement, recover from his client a fair compensation for his services.
2. An attorney at law who has been employed is under obligation to give advice when called upon by his client, and he is entitled to a just compensation therefor.
3. The father has the legal right to engage counsel to defend his minor son who owns property in his own right, and if the minor, after emancipation, ratifies the employment of counsel in his behalf while he was a minor, he is legally bound to pay the fees.

Safford v. Carroll, 382.

Morrison v. Flourney, 593.

Richardson v. Downs, 641.

BANKRUPTCY.

SEE INSOLVENCY—*Case v. McKan*, 36; *Case v. Cannon*, 112; *Steib v. Kaiser*, 337, etc.

BELLIGERENTS.

1. A combination of parties during the late war, and after the city of New Orleans had been captured by the United States forces, to carry on trade and commerce between said city and the surrounding country, outside of the United States military lines, was illegal. The courts will not, therefore, give effect to or enforce demands or obligations growing out of such illicit transactions.

Glasscock & Moore v. Wells, 517.

2. The fact that the creditor resided in the city of New Orleans,

BELLIGERENTS—Continued.

within the federal lines of military occupation during the late war, while his debtor resided within the Confederate lines of military occupation, both in the State of Louisiana, did not, under the dispositions of the Civil Code, work an interruption of prescription. The creditor can not, therefore, invoke such relation to defeat the plea of prescription. *Perrett v. Lee*, 553.

3. During the late war C, a British subject, entered into a contract with A, a resident of the State, whereby the former was to receive and take in his possession a large quantity of cotton and ship the same to Europe and divide the profits arising therefrom equally with A. A further condition of the agreement was, that if the cotton was destroyed or taken possession of by either of the contending forces, that then C was to recover and pay over to A his proportion of the amount so recovered on account of such forcible taking or destruction. The cotton was not taken or destroyed by either of the contending forces, but was destroyed by the accidental burning of the gin house in which it was stored. C gave his notes at the time of the execution of the contract in favor of A for an amount equal to his estimated interest in the cotton in case it was sold by C in Europe. A now brings suit on the note. Held—That the contract of the parties in reference to the cotton and for which the note appears to have been given, was not a sale of the cotton, and therefore C, who had given the note, was not in possession at the time it was destroyed by fire; that, not being in possession under a title, he could not be held liable for the price or value thereof. *Dunn v. Calderwood*, 642.

4. From and after the commencement of hostilities between the United States and the so-called Confederate States, all intercourse, trade and business was prohibited between the inhabitants of the two sections of the country. An indorsement of a promissory note, made by a resident of the so-called Confederacy, on a promissory note held by a citizen residing in one of the adhering States during the late war, was therefore void and not binding on the indorser. If the consideration of an obligation be shown to be Confederate treasury notes, its payment can not be enforced by the courts of Louisiana. Constitution, article 127.

Commercial Bank of Kentucky v. Nalle, 727.

BILLS AND PROMISSORY NOTES.

1. The holder of a check, drawn by a third party on a bank, has no action against the bank in case of refusal to pay. Therefore he can not oppose such check in compensation to his note held by the bank. *C. Case v. S. Henderson*, 49.
2. The maker of a note in favor of a bank can not urge, as a defense to its payment, that the appointment of a receiver by the govern-

BILLS AND PROMISSORY NOTES—Continued.

ment, to liquidate its affairs, was not regular. It is sufficient for the maker to know that a receiver was appointed, who holds the note, and that he will be discharged by paying it. ~

Case v. Marchand, 60.

3. A bank, by refusing to pay checks drawn upon it, does not incur a liability in favor of the payee. Therefore, the holder of checks on a bank can not, after payment has been refused, plead them in compensation against his note held by the bank or its receiver.

Ib.

4. A promissory note that has not been properly stamped with the required amount of internal revenue stamps can not be admitted in evidence on the trial of the case, nor can the judge who is presiding authorize the plaintiff to stamp it in his presence. In such a case the note must be stamped by the revenue collector of the district, and the fine must be either paid or remitted by the collector before the note can be received in evidence.

Corrie v. Billiu, 250.

5. If a promissory note be dated in Tennessee and made payable in New Orleans, and there is no stipulation as to the rate of interest, the rate of interest will be determined by the law of Louisiana.

Howard v. Branner, 369.

6. In a suit against the maker and indorser of a promissory note, the note of evidence of the clerk of the court below must show, in order to bind the indorser, that the certificate of notice to the indorser was offered separately from that of the note and protest. Therefore, if the note of the evidence only shows that the note and protest were offered, the indorser can not be held, even though the certificate of notice be attached to the act of protest and the entire document be annexed to the petition. An indorser can only be bound by evidence offered at the trial to show his liability, and he is never in fault for not making objection to the reception of evidence until such testimony is offered as will fix his liability if un rebutted.

Marchand v. Coffee, 442.

7. The holder of a promissory note who has acquired possession of the same before maturity as collateral security for the payment of a pre-existing debt, has the right to sue for and recover the whole amount thereof, notwithstanding the equities that may exist between the maker and the original payee. In such a case the person holding the note as collateral security is placed upon the same footing as that of any other innocent third holder of negotiable paper before maturity.

Smith v. Isaacs, 454.

8. A document or paper shown to be partly written by the maker of a promissory note, in which a proposition is made to compromise the note by selling and making title to a tract of land in payment

BILLS AND PROMISSORY NOTES—Continued.

- thereof, must be held as renouncing prescription by the maker of the note. *Kohn v. Davidson*, 467.
9. The notes or bills issued by the national banks of the United States, which are authorized by law to circulate throughout the Union as a medium of trade, are included in the phrase "United States currency." Larceny of such notes is therefore larceny of United States currency. *State v. Gasting*, 609.
10. A note of a commercial firm given by one of its members in settlement of a liability of the firm, as surety or guarantor, is binding on the firm if it be shown that the firm have recognized the acts of the member in contracting the liability and in making the note. *Bloom v. Stern*, 747
11. A stipulation in a written obligation to pay money that in case judicial proceedings be instituted to enforce payment, the lawyers' fees, fixed at ten per cent., to be at the cost of the maker, does not change its character from that of an ordinary promissory note. *Dietrich v. Bayhi*, 767.
12. A presentment by the notary of a promissory note to the maker for payment, is sufficient if made at his usual place of business, within reasonable hours, although he be absent therefrom at the time, because if absent during business hours he is bound to have some one there to represent him. *Ib.*

SEE COMMERCE.

SEE ATTORNEYS AND ATTORNEYS' FEES—*Safford v. Carroll*, 332.

BILLS OF CREDIT.

1. The notes issued by the city of New Orleans, known as city treasury notes, which, on their face, were made receivable for all debts and demands due the city, are not bills of credit within the meaning and intendment of section ten of article one of the Constitution of the United States. *Smith v. City of New Orleans*, 5.
2. The act of the General Assembly of 1869, authorizing the funding of these notes in interest bearing bonds of the city, was a ratification by the State which legalized their issue by the city. Therefore, any holder of such notes is entitled to recover the amount from the city, with legal interest, from judicial demand. *Ib.*
3. The prohibition contained in article one, section ten, of the Constitution of the United States, against the States emitting bills of credit, does not extend by implication to a municipal corporation of a State. The State, although prohibited from emitting bills of credit herself, may authorize a private or public corporation, within her borders and under her control, to do so. In the exercise of this prerogative by the State, there is no difference between the authorization granted to a private and a public or political corporation. *Ib.*

BILLS OF CREDIT—Continued.

4. A warrant, issued by the Auditor of Public Accounts in favor of a creditor of the State on the State Treasurer for money due, is not a bill of credit, nor is it such a negotiable instrument as entitles the holder to the protection of the law merchant. An innocent third holder of such paper can not therefore claim the protection of the law merchant against the charge by the State itself that such warrant was obtained through error and fraudulent practices by the original holder on the Auditor of Public Accounts. Nor can the third holder invoke the doctrine of estoppel against the State on the ground that the Auditor, as the fiscal agent of the State, having recognized the validity of the claim and given the warrant of the State therefor, the State was estopped from inquiring whether the consideration for which it was given was good and valid or not. *State ex rel. Smith v. Dubuclet, State Treasurer, 267.*

BONDS.

1. Bonds issued by corporations and owned by the city of New Orleans do not constitute a part of the franchises of the city, nor are they essential to the existence or proper exercise of the functions of the corporation. A judgment creditor of the city may therefore cause such bonds to be seized and sold in satisfaction of his debt. *City of New Orleans v. Home Mutual Insurance Co., 61.*
2. A bond taken by the sheriff, under an order of the court, for the release of property under seizure, must contain all the formalities required for the execution of judicial bonds. If defective in this respect, it is not binding on the sureties. Therefore, if a bond of release of property under seizure be not signed by the principal, but be only signed by the sureties, it is not binding on the principal nor the sureties. *Benham v. Collins, 222.*
3. The police jury of a parish have no authority, growing out of their general powers, to enter upon schemes of finance by executing and putting upon the market bonds or notes of the parish they represent for the purpose of raising money, or for any purpose whatever. Therefore, the holders of bonds or notes of the parish which have been executed by the authority of the police jury, or notes signed by the president and treasurer of the police jury, who themselves had no authority from the Legislature to make such bonds or notes, can not enforce their payment against the parish. Such bonds or notes, having been given or authorized by the police jury without any authority of law, are null and void and of no binding force or effect against the parish.
Breaux v. Parish of Iberville, 232.
4. The giving of a twelve months' bond for the price of property bid in under execution does not extinguish the debt nor novate the judgment. If the bond be not paid, the prescription applicable to judgments can alone be invoked by the judgment debtor.
Watt v. Hendry, 594.

BOUNDARY.

1. In an action of boundary of town lots, if it be shown by survey and plats of the town that certain squares have been laid out, marked and surveyed, starting from a given point with a fixed dimension in each square, and if it be shown further that certain contiguous squares have been subsequently laid off which touch and appear to run into the squares or lots first laid out, then the lots or squares last laid out, surveyed and marked must stop at the boundary line of the older surveys. And if any diminution of quantity occurs in the measurement of the lots or surveys, it must be borne exclusively by those holding under the surveys last made.

Robeson v. Howell, 601.

2. Where, in an action of boundary between certain lot owners in the city of Shreveport, a survey has been made by the city surveyor, and by other surveyors who differ with the city surveyor in their marks and lines, and the weight of the testimony is in favor of the correctness of the survey, marks and lines made by the city surveyor, then and in such case judgment will be given in favor of the boundaries established by the city surveyor.

Wells & Jones v. Caldwell & Cox, 607.

CITATION.

1. A judgment that has been rendered on a citation addressed to and served upon a partner of the defendant, in a partnership not alleged or shown to be commercial, is an absolute nullity for want of citation. An hypothecary action to recover real estate encumbered by a judicial mortgage resulting from the recording of such judgment, will, therefore, fail, because the judgment being absolutely null for want of citation, the accessory obligation arising therefrom falls with it.

Stevenson v. Kiser, 421.

2. The court having jurisdiction over the parish where the defendant resides and has his domicile, has jurisdiction to stay the execution of a judgment that has been rendered against him in another parish. On the trial of such injunction to stay the execution of the judgment on the ground that it was rendered without legal citation, parol evidence is admissible to show the fact. A judgment that has been rendered against a defendant without citation is absolutely void, and the fact may be shown whenever and wherever it is sought to be enforced against him.

Simpson v. Hope, 557.

3. A judgment that has been rendered against a party who has not been cited, is void, and will be reversed on appeal.

Phelps v. Taylor, 575.

4. Citation of renewal of a judgment must issue from the court that rendered the judgment, whether the defendant resides in the parish where it was rendered or be a resident of some other parish

CITATION—Continued.

of the State. C. P. 162. An exception that the defendant resides in another parish is therefore unavailing. Such citation may, however, issue in the name of or on the application of any person having an interest in the judgment. *Watt v. Hendry*, 594.

5. A judgment rendered without legal citation to the defendant is absolutely null and void, and the nullity may be shown by any party in interest, wherever and whenever it is sought to be enforced. *Waddill v. Payne*, 773.

6. The nullity of a judgment resulting from failure to cite the defendant may be urged before the court having jurisdiction of the property sought to be made liable to it, although it may have been rendered in another parish by a court which did not have jurisdiction of the property, and the party interested may, before the court having jurisdiction of the property, stay its execution by the writ of injunction pending the inquiry into its nullity. 23 An. 557. *Ib.*

7. The fact that the judge *a quo* has pronounced a citation good and sufficient, and has rendered a judgment thereon, which has not been appealed from, and has thereby become final, does not conclude the defendant or any other party interested from urging its nullity for want of citation whenever and wherever it is sought to be enforced. *Ib.*

8. A citation must be addressed to the defendant and served upon him or his agent. A citation addressed to a third party and served upon the defendant is not binding upon and will not authorize a judgment against the defendant. A citation addressed to a third party, who is the authorized agent of the defendant, and served upon him, is not binding upon and will not authorize a judgment against the defendant. *Ib.*

CLERKS AND CLERKS OF COURTS.

1. A person who makes a contract with a mercantile house or firm to act in the capacity of clerk and book-keeper in the store for a fixed rate, or price, and for a fixed period of time, on being discharged by his employers before the expiration of the time agreed upon, without any just cause therefor, is entitled to sue for and recover his wages for the entire time of his employment.

Bormann v. Thiele, 495.

2. The clerk of the district court can not be permitted to coerce a settlement of his costs by holding on to the transcript of appeal. In case, therefore, that the clerk refuses to deliver the transcript to the appellant, on the ground that his costs therefor have not been paid, a mandamus will issue to the clerk on application of the appellant directing him to deliver the record, and pay the costs of the writ. 22 An. 563, 578.

State ex rel. Washington v. Clerk of the Sixth District Court, 762.

COMMERCE.

1. The charge of ten cents per bale for weighing and inspecting each bale of hay brought to the port of New Orleans for sale, imposed by the acts of the General Assembly of 1867 and 1868, without reference to the State or place where the hay is made, is not a regulation of commerce between the States which is prohibited to the States by article one of the Constitution of the United States. Nor, secondly, does this statute lay any impost or duty on imports or exports. It being, therefore, neither a regulation of commerce between the States, nor an impost nor duty on imports or exports, it is valid, notwithstanding the amount herein imposed may not be absolutely necessary for the enforcement of the inspection laws of the State. *Board of Hay Inspectors v. Pleasants*, 349.
2. Plaintiff, a merchant in New York, sold a lot of goods to Kearny, Blois & Co., of New Orleans. The evidence is that the goods were shipped on board the steamer Texana, without insurance; that the Texana was captured by a rebel cruiser on the high seas and the cargo became a total loss. Plaintiff brings suit against Kearny, Blois & Co. for the amount of his bill so shipped, who resist the payment on the ground that, not having received the goods, they were not liable. Held—That the purchasers having ordered the goods and given special instruction not to insure, they must be considered as having taken the risk of the goods upon themselves, and they were therefore liable, notwithstanding they had not been received. *Elmore v. Kearny, Blois & Co.*, 479.
3. A factor or commission merchant who resides in the city of New Orleans, who accepts a consignment from a person acting as trustee in a State where such titles are universally recognized, can not compensate the claim against himself for the proceeds of the articles consigned with a debt held by him against the person from whom the trust is derived. *Bell v. Powell*, 796.

COMMON CARRIER.

1. A steamboat that takes goods on board at the port of New Orleans, and gives a bill of lading obligatory to deliver the goods at a given point or place on the Yazoo river, not on the route or line of the steamer, with the reservation of the privilege of transshipment, is liable in case of loss or failure to deliver the goods according to the contract. This liability is the same, whether the loss occurs before transshipment or afterward; in the latter case, the second vessel is as much theirs as the first, and the liability is the same as if the loss had occurred on the first vessel. *Hirsch v. Leathers*, 50.
2. A receipt given by a railroad company for goods to be transported to another point on the line of the road, is not a bill of exchange,

COMMON CARRIER—Continued

and is not therefore prescribed by five years, according to article 3505 of the Civil Code.

Flash v. New Orleans, Jackson and Great Northern Railroad Company, 353.

3. In 1862, while the insurgent authorities had control of the city of New Orleans and its surroundings, the Jackson Railroad Company gave a receipt for 360 barrels of molasses, which they were to transport to some other point on the line of the road. Some two months and a half thereafter the United States forces captured the city and took possession of the road at New Orleans. The molasses was not transported by the company. The owner brings suit against the company on the receipt for the molasses, which had gone into their possession and had not been accounted for. On trial the company made the defense that at the time they gave the receipt the road was under the control of the insurgent military forces; that the plaintiffs consigned the goods for shipment with a full knowledge of the condition of affairs, and took the risk incident thereto. Held—That under this state of facts the burden of establishing these defenses devolved exclusively on the company, failing in which the plaintiff must recover. *Ib.*

4. If a railroad company undertakes the transportation of cotton, with the special exception of liability on account of loss by fire, and the cotton is destroyed by fire while on the route, and it be shown that the loss was not attributable to the fault of the company, then and in that case the owner can not recover the damages from the company which the loss of the cotton has caused him.

Levy & Dieter v. Pontchartrain Railroad Company, 477.

5. If goods which have been shipped in good order have been lost on the voyage, it devolves on the carrier to show that the loss was occasioned by accidental and uncontrollable events, which, if established, the burden is then shifted on the shipper, before he can hold the carrier liable, of showing that the accident to the boat by which the goods were lost occurred through the fault of the carrier.

Kirk v. Folsom, 584.

COMMUNITY.

1. If a judgment has been rendered by a competent court, adjudicating community property to a surviving spouse, and neither fraud nor spoliation is shown, its correctness can not be inquired into collaterally. *Succession of Lydia Robinson*, 17.
2. The revenues of property which belongs to the husband, situated in Mississippi, who resides in Louisiana, do not belong to, or form a part of, the community. Therefore the husband who administers on the estate of his deceased wife, is not required to account to the heirs for the revenues derived from property thus situated during the marriage *Succession of Melissa Robinson*. 174.

COMMUNITY—Continued.

3. Movables, acquired subsequent to the dissolution of the marriage by the surviving spouse, do not constitute a part of the community. Therefore, if the survivor has sold a plantation and conveyed with it all the movables and fixtures belonging to the community, the vendor or his assignee may recover from the vendee all the movables expressly reserved in the act of sale, as not constituting a part or portion of the community, on showing that they have been acquired since its dissolution. *Andrews v. Ware*, 229.
4. If a man who is domiciled and has his residence in Louisiana, marries a woman in a foreign country, without changing his residence or domicile, but continues to reside here, the property acquired subsequently to and during the marriage becomes community property, although the wife has never resided in the State, because the domicile of the wife is that of the husband.
Succession of McKenna, 369.
5. The community resulting from marriage is not a partnership. A judgment creditor of the surviving spouse may, therefore, seize and sell an asset of the community in satisfaction of his demand, and the heirs of the deceased partner can not set up their residuary rights by way of injunction, and require the rules of partnership settlement of debts to be applied to the settlement of the debts of the community. *Baird v. Lemee*, 425.
6. A suit for separation of property by the wife implies a relinquishment of the community. When, therefore, as in this case, the wife has obtained a judgment separating her in property from her husband, and the husband retains certain lands in his possession and under his control during the time of the execution of the judgment, which are not claimed or sought to be placed in the community, but are treated as the separate property of the husband, she will be held and treated as having relinquished her community rights therein, and her heirs can not afterward maintain an action against the vendee of the husband for one-half of the land conveyed by him on the ground that it was community property. *Peck v. Gillis*, 500.
7. The community is dissolved by the death of one of the spouses, and the title to one-half thereof vests absolutely in the heirs, and the other half in the survivor. The survivor is, therefore, without legal authority to encumber or mortgage the one-half interest of the heirs in the community.
Walker & Vaught v. Kimbrough, 637.
8. The parish court has jurisdiction of an action of partition of the community between the heirs and the survivor without reference to the amount involved. *Ib.*
9. In this case notes were given with mortgage to secure advances to

COMMUNITY—Continued.

be made and supplies furnished and to be furnished. At the close of the transactions, plaintiffs bring suit on the account current, which includes in its items the amounts of the notes, and they ask a recognition and enforcement of the mortgage given to secure the notes. Held—That the notes having been given for a particular purpose, namely, to enable the merchants to negotiate them, and having been taken up by the agents of the plaintiffs, confusion took place, and they, the notes, became extinguished, and the mortgage given to secure them was also extinguished; and that as the mortgage was only given to secure the notes, it had no effect as a security for the account. *Ib.*

10. The value of improvements placed upon community property after its dissolution can not be taken into account in the settlement of the succession. In such a case its actual value, or what it will sell for, is to be taken as the basis of the account without reference to the original cost or the cost of any improvements made upon it.

Succession of Steele, 734.

11. If the separate estate of either the husband or the wife has been increased or improved during the marriage, the other spouse or his or her heirs shall be entitled to the reward of the one-half of the value of the increase or amelioration, provided it be shown that such increase or amelioration was the result of common labor, expense or industry. But if it be shown that such increase or amelioration was owing to the ordinary course of things, or the rise in the value of property, then and in such case there shall be no reward. R. C. C. 2403. *Ib.*

12. If by testamentary disposition the wife has been appointed testamentary executrix and given the usufruct of the whole estate of her husband, she may, on the application of the heirs or the legatees, be required to give security. *Ib.*

CONFEDERATE TREASURY NOTES.

1. In 1862, during the time that the city of New Orleans was under insurgent control and Confederate notes were the circulating medium, a judgment creditor who resided in the city caused execution to issue, by virtue of which the sheriff seized and sold the property of the debtor. The price of the bid was paid over to the sheriff in Confederate notes, which he deposited in bank. After the city had been captured by the United States, the judgment creditor demanded the amount of the sale in lawful currency. Held—That Confederate notes being the circulating medium at the time the *fiери facias* was placed in the hands of the sheriff, and also at the time the sale was made, and the judgment creditor being at the time a resident of the city of New Orleans, he must be presumed to have authorized the sheriff to take in payment

CONFEDERATE TREASURY NOTES—Continued.

such notes; that the sheriff being obliged to execute the writ, without the power to enforce payment in any other currency than Confederate notes, can not be compelled to return to the creditor any other currency than the notes he received.

Harvey v. Walden, 162.

2. When the sheriff has sold property under execution and taken an unlawful currency in payment, the action against the sheriff by the judgment creditor is not for moneys received by him, but for malfeasance in office in having sold property and received in payment thereof other than lawful currency. Such action is prescribed by one year. C. C. 3536, (3501). *Ib.*

3. A third purchaser of promissory notes, after maturity, stands in no better position than the original owner. Therefore, if the facts show that the original maker received an illicit currency for the notes, the third holder, after maturity, can not recover, even though he show that the maker used the illicit currency which he received for them in the payment of a valid obligation.

Winn v. Patrick, 204.

4. The collection of a note, the consideration of which is shown to be Confederate treasury notes and money lost in playing cards, can not be judicially enforced; and if judgment has been given in the court below for a portion of the note, and the evidence shows that the entire note is tainted with illegality, the Supreme Court will, in the interest of public policy, reject the whole demand.

Voinche v. Villemarette, 227.

5. A resident of Missouri, during the late war between the United States and the so-called Confederate States, while Confederate notes were the only circulating medium in New Orleans, shipped and consigned to merchants in the latter place a lot of corn to be sold. The corn was sold for Confederate money, and advices given to the owner with return of sales, and the Confederate notes which had been received were forwarded in kind; but on account of military operations they failed to reach the plaintiff, who resided in Missouri. On receiving notice of the result, the consignor objected to the mode of transmission by the agent in New Orleans, but made no objection as to the sale for Confederate money. Held—That having made special objection to the mode of transmission, and not having made any as to the consideration or currency received for the price of the corn sold, he must be considered as having ratified the sale and receipt of that kind of currency, and that he can not now recover on the account of sales.

Dunklin v. Horrell, 394.

6. If the consideration of a promissory note be shown to be Confederate treasury notes, it can not be recovered from the maker,

CONFEDERATE TREASURY NOTES—Continued.

even though the holder be a third person, who acquired it in good faith for a valuable consideration before maturity. Constitution, art. 127; 21 An. 569. *Baldwin v. Sewell*, 444.

7. The purchasers of a plantation at probate sale gave their notes to the administrator with an obligation, conditioned that if the heirs could not be forced to receive Confederate treasury notes in payment of the price, then the notes given were to be exigible. The heirs refused to receive Confederate notes in discharge of the debt. Suit was brought on the notes. Held—That inasmuch as the heirs had not accepted the Confederate notes in discharge of the debt, and under existing laws they could not be compelled to receive them, the notes given under the terms of the conditional obligation were still due and unpaid. *Martin v. Singleton*, 551.
8. Checks on a bank which have been loaned to a third party, can not be enforced against such third party by the drawer thereof, if it be shown that they were paid by the bank in Confederate treasury notes, on deposit in the bank to the credit of the drawer of the checks. *Irvine v. Short*, 721.

CONSTITUTION.

1. Article sixty-one of the Constitution commands the Governor to fill all vacancies that may occur during the recess of the Senate, by granting commissions, which shall expire at the end of the next regular session thereof. *State ex rel. George v. Tucker*, 139.
2. Article one hundred and twenty vests the General Assembly with power to determine the mode of filling vacancies in all offices for which provision is not made in the Constitution. *Ib.*
3. By the act of the General Assembly of sixth of March, 1869, the parish of Tangipahoa was created, and the Governor directed to appoint the various officers named in the act. The commission granted to the recorder stated that he should continue in office until the next general election for such office. *Ib.*
4. The act of the General Assembly of 1865, No. 52, granting to certain individuals named therein the right to cut a canal through the territory of the State of Louisiana and to use the lands contiguous thereto for the term during which the canal is to be enjoyed by the grantees, after which the lands are to revert to the State, is not a giving of State aid within the meaning of article 112 of the Constitution of 1854. Nor is the right given the grantees by the act No. 52 of 1865 to acquire the lands drained by the canal a giving of State aid. This latter clause, conferring on the grantees the right to acquire the lands drained by the canal, only confers a pre-emption or preference on the grantees over other persons to acquire certain lands. This act does not, therefore, violate article

CONSTITUTION—Continued.

112 of the Constitution of 1864, which was in force at the time it was passed.

State ex rel. Belden, Attorney General, v. Burgess, 225.

5. The act of 1865, No. 32, while it confers certain rights and privileges on the individuals named, does not constitute them a judicial person. It is not, therefore, in violation of article 121 of the Constitution of 1864, which prohibits the Legislature from creating a corporation. *Ib.*

6. This act does not violate article 127 of the Constitution of 1864, which declares that the swamp lands granted by Congress to the State to aid in levying and draining them, etc., shall not be diverted from the purposes for which they were granted, because it contains nothing which would indicate a purpose to violate this provision. It simply gives the grantees the right of pre-emption and fixes the price, and gives to them, on condition that they shall cut the canal within a given time, a term of credit. It directs that the proceeds arising from the sale, when due, shall be paid into the treasury, where the presumption is that they will be applied for the purposes for which the donation by Congress was made.

Ib.

7. The Legislature has no power by the terms and conditions of an act of the General Assembly to conclude the State itself from inquiring judicially into the validity and constitutionality of the act. In such a case the doctrine of estoppel has no application. In determining the amount of the debt of the State within the meaning of the third amendment to the Constitution, it was held that all bonds authorized to be issued by the General Assembly on condition that something was to be done by the grantee as a condition precedent to their issue formed a part of the debt and must be estimated. It was held further that bonds of the State, which had been issued to the banks, although amply secured by mortgage, could not on that account be excluded from the estimate.

State ex rel. Salomon & Simpson v. Graham, Auditor, 402.

8. The State having employed J. O. Nixon as public printer, and having made full and complete settlement for all claims and demands, it was held that the act awarding him a certain amount thereafter passed on first of March, 1871, to make up a deficiency which he claimed to have sustained by being compelled to negotiate the warrants at a discount, created a new debt against the State. It was further held that it being shown by evidence offered in this case, that the State debt, at the time of the passage of this act, was in excess of twenty-five millions, the constitutional limit to which the debt could be allowed to go, and that therefore the act No. 32 of March 1, 1871, appropriating to J. O. Nixon fifty

CONSTITUTION—Continued.

thousand dollars for the purposes set forth in the preamble of the act is unconstitutional, null and void. *Ib.*

9. Article 114 of the Constitution directs that every law shall express its object or objects in its title. The title of the act No. 68, of 1870, is silent on the question of the extension of the jurisdiction of the Third District Court of the parish of Orleans. Section 57 of this act, which gives jurisdiction to the Third District Court of the parish of Orleans in tax suits, is therefore unconstitutional and void.

State of Louisiana v. Wardens of the St. Louis Cathedral, 720.

CONSTRUCTION, RULES OF.

1. The assertion of a right to the same thing by another title and in a different capacity by the same parties, in a new suit, can not be construed as an acquiescence in the former judgment. Therefore the appeal which has been taken from the first judgment will not be dismissed on motion, because the same parties have brought another suit for the same thing under another title and in a different capacity.

Third Ward School District of New Orleans v. City Board of School Directors, 152.

2. The act of the General Assembly, approved March 16, 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans," etc., gives to the ward boards of school directors for the city of New Orleans the primary control and direction of the public schools of the city. The city board of school directors for the city of New Orleans, created by the same act, are subordinate in their powers and functions to those of the ward boards; they are not, therefore, authorized under this act to make contracts with teachers, receive or disburse the school funds belonging to or coming to the city for school purposes, the ward boards alone being vested with this power under the act. *Ib.*
3. In the matter of construing and interpreting the statutes of the State respecting the titles to and the liens on real property, the rule is well settled that the courts of the United States will give to such statutes the interpretation which they have received by the State courts. The State courts of Louisiana will not, therefore, be bound by a decision of the Supreme Court of the United States on a question of the registry of a mortgage, under a statute of the State, when such decision is adverse to the construction given to such statute by the State courts. *Levy v. Mentz*, 261.

CONTRACT.

1. By a failure on the part of one of the contracting parties to comply with the stipulations of the contract, the other party may, by

CONTRACT—Continued.

- first putting him in default, recover the damages sustained on account of such failure. *McNamara v. Clark*, 107.
2. A stipulation in a contract between a planter and a commission merchant, by which the former agrees to secure the latter in a certain amount in any event, is not illegal, and may therefore be enforced against the planter, notwithstanding he has failed to make a crop. *Stewart v. Dranguet*, 201.
3. The law does not require that the acceptance of a contract must be expressed on its face, nor is it essential that the act be signed by the party in whose favor it is made. The acceptance may result from his acts in availing himself of its stipulations or in doing some act which indicates his acceptance. *Balch v. Young*, 272.
4. A contract to remove slaves and other property to Texas and take care of them during the late war, and before emancipation by the sovereign power, the United States, was legal at the time it was made, and is therefore binding on the parties by and between whom it was made. *Powell v. Daniel*, 289.
5. Services rendered a person during his last illness as nurse and housekeeper are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such services is to pay a fair compensation therefore. The fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of as his concubine, does not impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and the services rendered were merely incidental to that mode of living. *Succession of Pereuilhet*, 294.
6. A contract made between a married woman and an overseer to oversee the plantation without the authorization or knowledge of the husband, is void and of no effect. Such a contract gives to the overseer no right of action to enforce it either against the wife or the plantation. *Guillory v. Guillory*, 552.

COPROPRIETORS.

1. One coproprietor of property held in common, can not be judicially compelled to incur a debt for improvements, in accordance with the views and wishes of the other, on the property held in common. In determining a question of this kind, courts are not required to call in aid natural law and reason, because the law-maker has made ample provision for the protection of the rights of coproprietors. *Morgan v. Morgan*, 502.

CORPORATIONS.

1. The certificate of the surveyor of a municipal corporation, that public work, in making wooden curbs and gutter with planks, un-

CORPORATIONS—Continued.

der a contract with the corporation, is done in accordance with the specifications, may be rebutted and overthrown by the testimony of witnesses to the contrary. *Rooney v. May*, 30.

2. The charter of the late City of Jefferson required a petition signed by the owners of one-fourth of the land on the entire length of the street to authorize the Council to cause a banquetto to be constructed thereon, and to impose the burdens thereof on the front proprietors. Under this statute it was held that if the Council gave out a contract for banquetting a portion of the street, on the basis that more than one-fourth of the land owned by the proprietors on the part of the street which was improved had petitioned the Council therefor, that then and in that case the front proprietors of the part of the street so improved could not be compelled to contribute to the expense thereof, because the contract had been given out by the Council in violation of law.

McKee v. Brown, 306.

SEE NEW ORLEANS.

CRIMINAL LAW AND CRIMINAL PROCEEDINGS.

1. The fact that a person was called to serve as a talisman on a jury in a criminal trial, who had been exempted from serving on the regular panel, did not vitiate the jury. *Per curiam*: Such a juror might have served on the regular panel, if he had chosen to waive his exemption. *State v. Morningstar*, 8.
2. The counsel for the accused asked the judge to incorporate in his charge to the jury certain extracts furnished from decisions, to which the judge informed the jury that he had already given to them the substance of the extracts referred to as law. Held—That the reasons, given by the judge for not giving the charge, were sufficient. *Ib.*
3. Evidence to show that a translator, selected to interpret the testimony of witnesses who testify in a language not understood by the counsel, the court or the jury, is incompetent, can not be admitted after verdict, on a motion for a new trial. The objection is too late, if not made during the trial. *State v. Lemodelio*, 16.
4. In a criminal trial, on an indictment for forgery, a paper or document, shown to be in the handwriting of the accused, which has no relation to, or connection with, the document forged, is not admissible in evidence to prove by a comparison of the handwriting, that the forged document is in the handwriting of the accused. *State v. Fritz*, 55.
5. In an indictment for murder, the accused is charged with killing and murdering one Ambrosio, whose first name is unknown. The jury found a verdict of guilty, and the accused pleaded in arrest of judgment, that the indictment was void for uncertainty, in not

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

giving the first name of the deceased; that the description by name of the person killed is repugnant, because Ambrosio in French or Spanish, in Latin Ambrosius, in English Ambrose, are first names. Held—That a description of the deceased by the first or second name is sufficient, if the fact be stated that the other name is not known; that the indictment is not void because the first name of the person killed is not given.

State v. Bayonne, 78.

6. A bill of exceptions was also taken to the ruling of the judge *a quo*, in reference to the testimony of an accomplice, as follows: The judge charged the jury that the witness, charged as an accomplice, was as any other witness, but that his credibility was entirely with the jury; that, if they believed his testimony, it was competent for them to find a verdict on his testimony alone; but he advised them not to do so unless this testimony was corroborated; that they were judges of both law and fact. Held—That this charge, taken as a whole, was not erroneous; that the State has the undoubted right to make use of the testimony of an accomplice, and he is a competent witness, yet the credibility of his testimony may be subject to suspicion, which the jury, under this charge, were not prohibited from considering. *Ib.*

7. The voluntary declarations of the accused, made before the committing magistrate on a preliminary examination, and certified to by him in the presence of two witnesses, in conformity with section 1010 of the Revised Statutes of 1870, can not be offered in evidence or used on the trial before the jury by the accused. Declarations so taken are intended only to perpetuate for the use of the State such confessions as the accused may choose to make.

State v. Vandergraff, 96.

8. In a criminal case no appeal lies, except where the accused has been sentenced with the punishment of death or imprisonment at hard labor, or condemned to pay a fine of three hundred dollars. Constitution, article 74. Therefore an appeal will not lie, on behalf of the State, from an order of the court granting a new trial and continuing the case. *State v. Welsh and Fagan*, 142.

9. A juror who has formed an opinion based on common rumor without any prejudice or bias against the accused, is not disqualified from sitting on the trial. *State v. Caulfield*, 146.

10. After the accused has been indicted and pleaded not guilty, it is too late to urge his right to a preliminary examination before a committing magistrate. *Ib.*

11. Questions of fact, as to whether certain witnesses who testified on the trial, had sworn falsely, can not be noticed on appeal. Constitution, article 74. *Ib.*

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

12. The fact that alcoholic liquors were furnished the jury, to be used by them for refreshment, while sitting on a protracted trial, does not vitiate their verdict; nor is this fact of itself good cause for a new trial. *Ib.*
13. The presence of the sheriff or his deputies in the jury room during the trial is not misconduct, and the sheriff did nothing more than his duty in procuring a change of clothing for the jurors during the trial, which lasted five days. *Ib.*
14. The deposit of the *venire* with the clerk and posting it up in the clerk's office on the first day of the term are a sufficient compliance with the law requiring it to be filed in the clerk's office on that day. *Ib.*
15. The objection by the accused that he was not served with a true copy of the *venire* and indictment, is not good ground for a motion in arrest of judgment. *State v. Clark*, 194.
16. In a criminal trial for a capital offense, the jurors are not permitted to separate; and if a separation takes place, misconduct and abuse will always be presumed and a new trial ordered. *State v. Frank*, 213.
17. In a criminal case, the objection that there was no order of the court authorizing the filing of the information, comes too late if only made for the first time in the Supreme Court. *State v. McCort*, 326.
18. The jury, finding the greater offense charged in the indictment was not committed by the accused, have the right to modify their finding so as to bring in a verdict of guilty of the lesser offense charged. *Ib.*
19. The revisory legislation of April, 1870, did not repeal, but continued in force all laws which were in existence before, and was continued in the revised act. *State v. Brewer*, 22 An. 273. Therefore, if an offense had been committed against the law as it stood before the passage of the revisory legislation, but which was not punished until after it passed, and the statute thus violated had been re-enacted in the revisory legislation of 1870, such offense is still punishable, notwithstanding the repealing clause of the revisory act of April, 1870, repeals all laws not contained therein except such as are specially excepted. *Ib.*
20. Although the general rule is well settled that the right of the accused to be heard by counsel is entitled to the largest latitude, yet, if the question which the judge *a quo* refuses the counsel of the accused to urge before the jury is one of law alone, which can not prejudice the rights of the accused, whether it be determined one way or the other, then and in such case a new trial will not be granted because the counsel was refused permission by the judge *a quo* to argue the point to the jury. *Ib.*

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

21. In a criminal case the accused is entitled to an appeal from the verdict of the jury and the judgment of the court thereon, if the offense charged is of sufficient magnitude to give the appellate court jurisdiction, without reserving bills of exceptions during the progress of the trial, or making a motion in arrest of judgment or making a formal assignment of errors apparent on the face of the record. 13 An. 486, 489. *State v. Forrest*, 433.
22. Except for the crimes of murder, arson, robbery, forgery and counterfeiting, all prosecutions must be commenced by the finding of the indictment or by filing the information within one year next after the offense shall have been committed. Revised Statutes of 1870, § 986. Therefore, if the accused has been tried and convicted of the crime of horse stealing, and has taken an appeal therefrom, the verdict will be set aside and the judgment of the court below reversed, if the record shows that the information was not filed until more than one year had elapsed after the offense was committed. *Ib.*
23. The judgment of the court below in a criminal case will not be reversed on appeal, if it appear that the judge *a quo* has assessed a smaller fine on the accused than he was authorized by law to impose. *State v. Evans*, 525.
24. The ruling of the judge *a quo*, on a motion for a continuance of a criminal case, involves both questions of law and fact, and can not therefore be examined on appeal, because the jurisdiction of the appellate court in criminal cases is limited to questions of law alone. Constitution, article 74. *State v. Wilson*, 558.
25. As a general rule in criminal trials the dying declarations of the person killed, and for whose murder the accused is on trial, are alone admissible, and the inquiries in such declarations must be confined to the circumstances and cause of his death. But if it be shown as matter of fact that another person was mortally wounded in the same difficulty, or by the same shot which killed the other party for whose murder the accused is on trial, then and in such case the rule above stated is so far relaxed as to admit in evidence on the trial the dying declarations of such third person. *Ib.*
26. If the deposition of a person in a criminal case does not show on its face that it is her dying declaration, it will not be excluded on that account if it be shown by evidence *aliunde* that it was her dying declaration. *Ib.*
27. The omission of the district attorney to sign the finding of the grand jury, will not avail the sureties on the bond given by the accused before the indictment was found. 21 An. 600. The question as to how the amount came to be written in the body of a bond given for the release of a criminal, can not be examined in a suit against the sureties for its forfeiture. *State v. Snow*, 596.

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

28. In an indictment for larceny, if an amendment correcting the name of the owner of the property stolen be allowed without objection, the trial may go on at the discretion of the judge, without a new arraignment or the jury being resworn.

State v. Holmes, 604.

29. The objection by the accused that he was not served with a correct list of the jury that was to try him comes too late if not made until after verdict. It can not be entertained if made for the first time by a motion in arrest of judgment.

State v. Vester, 620.

30. The objection by the accused that he was not served with a correct jury list comes too late if not made until after verdict. A clerical error in the minutes of the court by which the name of a grand juror has been incorrectly spelled, may be corrected *nunc pro tunc*, so as to correspond with the names on the *venire*. Such discrepancy, if corrected, is not good ground for a new trial. 2 An. 745; 9 An. 94; 10 An. 198.

State v. Axiom, 621.

31. The jury, in a verdict of manslaughter, have nothing to do with fixing the punishment. Evidence which goes only to the mitigation of punishment, and is conceded not to constitute any legal excuse, is therefore irrelevant and not admissible.

State v. Tally, 677

32. The jury are the judges of the law and the facts, but when setting on the trial of a criminal cause, they should take the law as given them by the judge. The jury may, however, disregard the construction of the law as given by the judge.

Ib.

33. A bond conditioned for the appearance of a party charged "with having committed the crime of shooting at with intent to kill." without further terms of description or words to render the sense more definite, is void and without effect.

State v. Gibson, 698.

34. Under the act of 1868, amending the act of 1855, relative to a change of venue in criminal cases, the judge of the district court is required to grant such change on the application of the Attorney General, the district attorney or the district attorney *pro tempore* on behalf of the State, without giving any other reasons therefor than those embraced in the application. The writ of mandamus will therefore issue from the Supreme Court on the application of the district attorney, directing the judge *a quo* to grant the change of venue, such order being issued by the Supreme Court in aid of its appellate jurisdiction.

State ex rel. Merchant, District Attorney, v. Train, Judge, 710.

CURATOR AD HOC.

1. The written acceptance by a person appointed by the court as curator *ad hoc* in a suit brought against an absentee, in the absence of a citation served upon him or any appearance by him

CURATOR AD HOC—Continued.

in the proceedings, will not serve to interrupt the current of prescription. *Roubieu v. Champlin*, 214.

2. A party who removed from New Orleans to a foreign country and designated a person who resided here as his agent, and the agent died soon after he left, and he failed to designate another agent, and suit is brought against him to enforce a mortgage which he gave before leaving, by executory process, such party can not, on returning to the State after the property has been sold, and in a petitory action to recover it back from the purchaser at sheriff's sale, be heard to urge that the sale is null because it was made contradictorily with a curator *ad hoc* appointed by the court to represent him as an absentee, when, in law, he was not an absentee, but only temporarily absent. 19 An. 351 ; 21 An. 203.

Dixey v. Irwin, 426.

3. The designation of a party appointed by the court to represent an absentee in executory proceedings as curator *ad hoc*, will not render void the proceedings, if it appear from the records of the court, or otherwise, that the party appointed is an attorney at law. 21 An. 692. *Ib*

SEE ATTACHMENT.

DAMAGES.

1. In an action in damages for false imprisonment malice will be inferred, if the record shows a want of probable cause for making the arrest. The inexperience of the attorney who advised and instituted the proceedings, while it cannot justify the arrest, may properly be invoked in mitigation of the damages to which his client has been subjected. *Mortimer v. Thomas*, 165.
2. A street railroad company is responsible in damages if, through the negligence or carelessness of the driver of the street car, a boy is run over and injured. The measure of the damages in such cases is to be determined by the extent of the injury done. If the finding of the jury is supported by the evidence in the record both as to the fact of the infliction of the injury through the carelessness and negligence of the driver of the car and the extent of the injury done, their verdict fixing the amount for which the company is liable, will not be disturbed on appeal.

Barksdull v. The New Orleans and Carrollton Railroad Company, 180.

3. If the evidence shows that the boy who was run over by the car, was physically and mentally able to take care of himself on the street, and that he was in the habit of traveling the public streets alone, the driver of the car or the company owning the road will not be permitted to set up in defense to the action for damages, that the accident occurred through the negligence or want of con-

DAMAGES—Continued.

sideration in the father in allowing the child to go on the streets alone, nor will the fact that the child failed to get out of the way be allowed to weigh in favor of the company in mitigation of damages, if the evidence shows, as in this case, that the driver was driving the car at the time of the accident at an unusual, if not an unlawful, rate of speed. But in such case the company will be held liable to the full extent of the damages caused by the injuries which the boy has sustained. *Ib.*

4. To enable a defendant to recover damages for the non-completion of a job of repairing a steam boiler within the time specified in the contract, it must be shown by defendant that the fault was with the plaintiff. If the evidence shows that the delay was unavoidable, and that the plaintiff made the defendant acquainted with the causes of the delay, no damages can be recovered on account thereof. *Drummond v. Steamer Castro*, 221.

5. A merchant who purchased a lot of cotton in New Orleans, classed as low middling by his own agent, who afterward shipped it to Havre, France, and sold it as low middling, is not entitled to a reclamation from the vendor in damages for false packing, by which the inside of the bales is inferior in quality to that of the outside. *Poutz v. Theard*, 246.

6. To enable a party to recover damages for injuries caused him by a collision with a street car, he must show that he exercised a reasonable degree of prudence and caution in endeavoring to avoid the accident. If, on the contrary, the evidence shows that the person injured by such a collision, while the car was in motion on the track, failed to exercise a reasonable degree of prudence, which if he had done the accident would not have occurred, he can not recover damages from the company for the injuries received, either to his person or his property, even though the driver of the car be himself at fault.

Mercer v. New Orleans and Carrollton Railroad Company, 264.

7. Injuries done to one's feelings by slanderous words used toward him by another in public, such as "thief and rascal," furnish legitimate ground for an action in damages, and the amount of damages will be measured by the aggravated character of the language used. 17 An. 64; 19 An. 322. *Dufort v. Abadie*, 280.
8. The vendee of a purchaser at sheriff sale, though expressly subrogated to all the rights and privileges acquired by his vendor under the sheriff sale, has no right of action against the recorder of mortgages for having given an imperfect and erroneous certificate, whereby his vendor was induced to purchase property charged with incumbrances not made known at the time of the sale. The action for damages against the recorder for omitting to give a full

DAMAGES—Continued.

and complete certificate of the incumbrances on the property to be sold is a personal one, and can, therefore, only be exercised by the purchaser at sheriff sale. *Morano v. Shaw*, 379.

9. Third parties who have stored or deposited their cotton in the gin of the defendant, can not recover damages from the seizing creditor, caused by the burning of the gin while it was under seizure, unless it be shown affirmatively that the seizure was the cause or occasion of the fire. *Hobson v. Woolfolk*, 334.

10. Persons who, while attempting to get on the cars at the depot station after they have been put in motion, were thrown off and severely injured, can not recover the damages therefor from the railroad company, because their own negligence and indiscretion contributed directly to the disaster. In such a case, when it is shown that the cause of the injury is attributable in the first instance directly to the imprudence or fault of the person who has received the injury, damages can not be recovered from the company, even though it be shown that they were in fault.

Knight v. Pontchartrain Railroad Company, 462.

11. Where the evidence in the record in a suit for damages for the violation of a commutative contract makes it clear that the defendant is in fault and liable, the judgment of the court below awarding the damages will be affirmed on appeal

Burbank v. Bloom, 476.

12. In this case the evidence establishes that a small boy, eight years old, a son of the plaintiff, attempted, while the steam car was in motion, on the way from New Orleans to Carrollton, to jump from the ground near the track to the platform of the car; that he was thrown from the car to the track and one of his leg cut entirely off by the wheel of the car. It is further shown that shortly before the accident he was told by a person on the car not to attempt to get on, that he would get hurt, etc.; that the boy was not a passenger on the car, which had then left the station and was in motion on the track. Held—That the accident having occurred to a person not a passenger, without any fault or blame on the part of those in charge of and running the cars, the company was not therefore liable for the damages caused by the injury which such person had received on account of the accident.

Hubener v. New Orleans and Carrollton Railroad Company, 492.

13. A party who brings suit for the damages resulting from the non-fulfillment of an obligation on the part of the other party, must show under the general issue that he has complied with all the conditions imposed upon himself by the obligation, before he can be heard to urge the acts of violation of the obligation by the other party as a reason for not putting him in default.

Dean v. Frelsen, 513.

DAMAGES—Continued.

14. The burden falls on the defendant who sets up a claim in reconviction in damages caused by the plaintiff, who has failed to fulfill his contract within the time specified, of showing that he caused him, the plaintiff, to be put in default.

Southern Dry Dock Company v. Steamship Tabor, 728.

15. To enable a party to recover damages from a street railroad company for injuries inflicted by the car while in motion, by running over and wounding a child, it must be shown affirmatively that the accident occurred through the fault or negligence of the driver.

Klein v. Crescent City Railroad Company, 729.

16. The act creating the master and wardens of the city of New Orleans does not prohibit any merchant or body of merchants from employing any other person to examine and survey damaged goods in cases where they were interested. An injunction will not, therefore, lie against any person thus employed, nor can the master and wardens recover damages from the merchants who have employed such person, nor from the person employed.

Wardens of New Orleans v. Foster, 750.

17. A person driving a horse and vehicle through the streets of New Orleans who, by inattention or negligence, allows the horse to run away, is liable to the city for the damage done the public property of the city by the running away of the animal. The measure of damages in such a case is the injury done to the property.

City of New Orleans v. Heres, 782.

18. In a suit for damages on an injunction bond, if the record shows that the equitable remedy of injunction has been abused, and the administration of justice has been trifled with, then and in such case the court will assess against such party the highest damages allowed by law.

Walker v. Villaraso, 799.

DEPOSITARY.

1. A depositary is bound, in the absence of any judicial proceedings, to hold the property deposited subject to the order of the depositor. C. C. 2920, 21 and 29. A depositary can not therefore be held liable in damages, in the absence of proof of fraud, for obeying the orders of the depositor.

Britton v. Aymar & Bryant, 63.

2. In this case the evidence in the record shows that the plaintiff deposited a lot of cotton in the defendants' warehouse; that a lien was given and recognized by the depositors for the payment of the charges of storage; that the cotton was two days thereafter seized by the treasury agent of the United States. Held—That the depositary, not being able to resist the seizure and consequent custody of the cotton by the United States, acting through the Treasury Department, could not be held liable in damages for the

DEPOSITARY—Continued.

failure to deliver it, when demanded by the depositor. *Per curiam*: The fact that the seizure was subsequently released by the authorities of the Treasury Department of the United States, is not to be taken and construed against the depositary. The agents of the Treasury Department are presumed to have acted honestly in the discharge of their duties, and therefore collusion with the defendants in making the seizure will not be presumed. *Ib.*

3. In a case of a confidential contract arising from irregular or special deposits with a bank, compensation does not take place, and the depositary is not authorized (under the pretense that a custom exists to that effect) to apply the funds on deposit to the payment of the debts of the depositor. 2 An. 25; 11 An. 73; 10 R. 200.

Murdock & Williams v. Citizens' Bank of Louisiana, 113.

4. In this case the evidence shows that a special deposit was made in coin; that the bank soon after suspended specie payment; that a promise was made by the bank and inserted in writing in the bank book of the depositor that so soon as the bank resumed specie payment it would return the same in coin. The parties had subsequent transactions, predicated on Confederate notes as bankable funds. The bank now seeks to avoid the payment of the deposit in coin, on the grounds that the depositor had since the deposit become indebted to it, which, by a custom among bankers, it had extinguished by crediting the amount on the indebtedness of the depositor; that it was authorized and protected in making this credit by a military order of the General of the army of the United States in command at the time. Held—That if such a custom existed, the bank could not avail itself of it in this case, because the law did not authorize it unless under a special mandate from the depositor; that the bank could not claim protection under the military order, because the money was not taken from the vaults of the bank and appropriated to the payment of the debts of the depositor under such order. *Ib.*

DISTRICT COURTS.

1. The district courts have original jurisdiction in all cases (not probate) where the amount involved is above five hundred dollars, exclusive of interest, without reference to the defense which may be urged against the claim. Constitution, article eighty-five.

Daigle v. Lirette, 34.

2. Therefore the district court has jurisdiction *ratione materiæ* in a damage suit where one thousand dollars are claimed, although the verdict of the jury only awards one hundred dollars. *Ib.*
3. The district courts have no jurisdiction over the settlement of disputes purely probate in character. The parish courts have exclusive jurisdiction over such disputes.

Sevier v. Succession of Gordon 212.

DISTRICT COURTS—Continued.

4. The act of the General Assembly, approved March 19, 1870, entitled "an act to establish an additional district court for the parish of Orleans to define the jurisdiction thereof, and to recognize and determine the jurisdiction of the existing seven district courts for the parish of Orleans," vested in the Eighth District Court, created by the act, exclusive jurisdiction over all cases of injunction, mandamus, etc. The other district courts of the parish of Orleans were therefore divested of all jurisdiction over such cases from and after the passage of the act. The fact that a judge for said Eighth District Court was not appointed and commissioned until some time thereafter, did not continue the jurisdiction over such cases as the act vested exclusively in the Eighth District Court until a judge was appointed and qualified therefor.

State ex rel. Durbridge v. Pratt, 730.

5. A judgment rendered by the Sixth District Court for the parish of Orleans, after the passage of the act creating the Eighth District Court of the parish of Orleans, is therefore null and void, because the court was without jurisdiction. *Ib.*

DOMICILE.

1. A judgment rendered against a party whose domicile and residence is not in the parish where the court is held, is null and void, because the court is without jurisdiction *ratione personæ*. In such a case consent of the defendant can not give jurisdiction. Act of 1861, amending article 162 C. P. *Richardson v. Hunter*, 255.

ELECTION.

1. Under the election law of 1870 the whole parish is constituted an election precinct. Therefore votes for ward officers of the parish, such as justices of the peace and constables, may be cast at voting precincts outside of the ward for which the officer is to be elected. A contest for the office of justice of the peace of a particular ward of a parish, predicated on the fact that a majority of votes cast in that ward were in his favor, can not, therefore, be maintained, if his opponent has received a majority of all the votes cast for that office at all the voting precincts of the parish.

Buckner v. Ruston, 230.

EVIDENCE.

1. In a suit on a promissory note against the maker, parol evidence is admissible to show an interruption of prescription. Section 2 of the act of 1858, No. 208, page 148, requiring written evidence to prove acknowledgment so as to interrupt prescription by persons deceased, does not apply to cases where the maker of the note is living. *Ross v. Johnstone*, 109.
2. The burden of showing that the note sued upon has been paid, falls upon the party who makes the plea; and the exhibit of an

EVIDENCE—Continued.

- open account against the holder of the note, can not be pleaded in compensation or payment of the note. *Ib.*
3. In a suit on an open account, the plea of compensation and reconvention by the defendant admits its correctness, and the testimony of the plaintiff, given on the trial, in answer to a question on cross-examination, can not, of itself, be so construed as to change its character from that of an ordinary suit for debt to an action *ex delicto*, *Normand v. Edwards*, 142.
4. The wife is a competent witness to testify in a suit brought by a creditor of the husband to annul a judgment of separation of property between the husband and wife. *Keller v. Vernon*, 164.
5. The correctness of a judgment of separation of property may (when attacked by a creditor of the husband) be established by evidence *aliunde*. Therefore, evidence tending to show that the husband received from the wife funds derived by succession from the estate of one of her deceased relatives prior to her judgment of separation, is admissible to establish the validity of her judgment in a suit by the creditor to annul it. *Ib.*
6. The testimony of a witness residing out of the State, when taken before a notary public of the place where the witness resides, under a commission from the court directed to any notary public in said county where the witness resides, is inadmissible in evidence until the capacity of the notary who takes it is duly shown in the mode provided by law. The certificate of the county clerk of the county where the notary resides is not sufficient attestation of his capacity as notary to authorize the courts of Louisiana to receive the testimony taken under a commission which does not name the commissioner. *McDonald v. Wells*, 189.
7. An order given for the price or value of a lot of cotton, together with the judicial admission made by the party who gave the order, in a suit for the recovery of another lot, which includes the lot for which the order is given, is sufficient to establish that the cotton for which the order was given was in the possession of the person who gave the order for the payment of its price. Under this showing, the person giving the order for the payment of a certain lot of cotton can not escape his liability for the price on the ground that it was shipped to another house or establishment without his knowledge or consent, and that he is not, therefore, liable. *Voinche v. Edwards*, 195.
8. Parol evidence is inadmissible to prove an agent's authority to sell immovables. Buildings and other constructions attached to the soil are immovables by their nature. C. C. 464. Therefore, in a suit to cause the return of a building that has been demolished and removed, parol evidence will not be admitted to show authority

EVIDENCE—Continued.

in the agent of the owner to sell, nor to show a sale from the agent. *Keary v. Ducote*, 196.

9. A notary public who has made a protest of a promissory note and given due notice thereof to the indorser, can not be permitted, in a suit to enforce payment against the indorser, to contradict or vary what he has certified to in the act of protest.

Garthwaite v. Casson, 218.

10. A private agreement between the maker of a note in favor of the wife of another and her husband to the effect that her husband, as the agent of his wife, was authorized to receive payment of the note, is inadmissible in evidence on the trial of a suit to enforce payment of the note. *Berry v. Marshall*, 244.

11. In case of a conflict of testimony between two witnesses on opposite sides of the case, the one testifying directly the opposite of the other about a fact, the opinion of the judge *a quo*, who heard both witnesses, is entitled to great weight, and his decision as to the preponderance of the testimony will be followed by the Supreme Court. *Laforet v. Weber*, 253.

12. In this case the evidence shows that plaintiff kept a bank account with defendant; that the book-keeper of plaintiff kept the cash account, made the deposits, etc., and that his relation toward plaintiff were well understood in the bank; that the book-keeper of plaintiff drew a check on the bank for \$2500, to which he forged plaintiff's signature, which was an amount above the account to the credit of plaintiff in the bank; that notice was given by the bank that plaintiff had overdrawn his account, who, on being shown the check for \$2500, said he had not signed it, but did not say that it was a forgery. On seeing his book-keeper, he reported back to the bank that it was all right. Subsequently the book-keeper drew another check on the bank for \$1700, and again forged the signature of the plaintiff thereto, which the bank paid on presentation. On discovering the second forgery by the book-keeper, six months after the first, plaintiff denounced the act. Held—That the act of the plaintiff in ratifying the first act of forgery made by his book-keeper exonerated the bank from all liability for having paid it; that his afterward keeping the book-keeper in his confidential employ misled the bank and threw it off its guard; that, having approved and ratified the first forgery, the bank was excused for paying subsequent checks similarly drawn; that the plaintiff had by his own acts caused the injury, and he must therefore bear the loss. *Dé Feriet v. Bank of America*, 310.

13. The decision of this case involves only questions of fact as to the relative proportion of the claims which had for their consideration the sale of slaves and the sale of land and personal property.

EVIDENCE—Continued.

The principles on which the present decree is based were settled in the decision of the same case, reported in 21 An. page 771, viz: That obligations having for their consideration the sale of land and slaves could only be enforced to the extent of the ascertained value of the land at the time of the sale.

Satterfield v. Spurlock, 327.

14. The evidence in this case shows that during the year 1862, while Confederate notes were the only circulating currency in the Southern States, that B, a commission merchant in the city of New Orleans, had a lot of Confederate money in his hands to the credit of A; that, at the request of A, B, the merchant, addressed a letter of credit to C, the creditor of A, authorizing him to draw for the amount of the indebtedness of A; that C did draw on B for a portion of the indebtedness of A, and received the amount in Confederate money. C, the creditor of A, now brings suit against B for the amount of the indebtedness of A, disregarding the transactions under the letter of credit whereby he had received a portion of his debt in Confederate money. Held—That under this state of facts B, the merchant, can only be considered as the agent of A to pass over the Confederate money in his hands belonging to A to his creditor, and he can not, therefore, be held liable to C on his assumpsit of the debt of A, which could only be discharged in lawful currency. *West v. Miltenberger*, 408.
15. Parol evidence is inadmissible to contradict or vary a written agreement of the parties. *Tourne v. Mathieu*, 445.
16. A written acknowledgment of a debt by a deceased person, made before his death, being first proved, parol evidence is then admissible to show that no other debt was due to the creditor than the one presented. *Succession of Kugler*, 455.
17. A protest of a foreign bill of exchange made by a foreign notary is admissible in the courts of this State to establish presentment, demand and nonpayment, without proof of the signature and capacity of the notary being made. But the act of the General Assembly of this State, which makes the certificate of notice by the notary competent evidence of such notice, only applies to notaries of this State. Therefore a certificate of notice by a foreign notary, attached to the protest of a foreign bill of exchange, is not sufficient proof in the courts of this State that the proper notice was given. *Schorr v. Woodlief*, 473.
18. A party who brings suit against another for cutting and removing timber from his land must show—first, that he is the owner or proprietor of the land; and, secondly, that a certain specific number of trees have been taken from his premises, failing in which he can not be permitted to recover. *Sorrel v. Carlin*, 523.

EVIDENCE—Continued.

19. The *proces verbal* of a surveyor appointed as an expert to determine a boundary line, if not authenticated, is nothing more than a memorandum, and is not therefore admissible in evidence as an authentic document on the trial of an action of boundary.
Latiolais v. Mouton, 529.
20. Proving that a debtor paid a sum credited on his note on the day and date that the credit is made on the note, is tantamount to proving an acknowledgment of the debt. Parol evidence to establish such credit is, therefore, inadmissible after the maker of the note has died and payment is sought to be enforced against his succession. 21 An. 300.
Pavy v. Escoubas, 531.
21. Proving that a debtor made a payment on the day and date that it is credited on his note is proving an acknowledgment of the debt. Parol evidence, offered to establish that he made the payment as credited on the note, is therefore inadmissible after the maker has died and payment is sought to be enforced against his succession. 21 An. 350.
Broussard v. Breaux, 549.
22. The court having jurisdiction over the parish where the defendant resides and has his domicile, has jurisdiction to stay the execution of a judgment that has been rendered against him in another parish. On the trial of such injunction to stay the execution of the judgment on the ground that it was rendered without legal citation, parol evidence is admissible to show the fact. A judgment that has been rendered against a defendant without citation, is absolutely void, and the fact may be shown whenever and wherever it is sought to be enforced against him. *Simpson v. Hope*, 557.
23. Parol evidence is inadmissible (except to prove fraud) to contradict the judicial records of a court. 3 An. 619; 12 An. 349.
Henderson v. Walmsly, 562.
24. In an action to rescind a sale of immovable property on the ground of lesion beyond moiety, parol evidence is inadmissible to prove that there was another consideration which entered into the contract besides that expressed in the deed. In such action, parol evidence is only admissible to show the value of the property at the date of the sale.
Girod v. Vines, 588.
25. The burden of proof falls upon the defendant, when he alleges want or failure of consideration of the note sued upon.
Berwin v. Gauger, 617.
26. An acknowledgment of a promissory note may be proved by parol testimony so as to interrupt the current of prescription.
Ludeling v. Boozman, 673.
27. Evidence tending to show that the plaintiff admitted that the defendant or his agent had settled or liquidated the indebtedness, or the greater portion thereof, is admissible under the general issue.
Rabun v. Cage, 675.

EVIDENCE—Continued.

28. If evidence has been offered and received on a former trial, the plaintiff can not urge that he is taken by surprise if it be offered again. Nor can the defendant urge such objection in case the plaintiff has offered evidence which has been received on the former trial. The rule applies with equal force to both plaintiff and defendant. *Ib.*
29. A guaranty is a promise to answer the payment of some debt or the performance of some duty in the case of the failure of another person who in the first instance is liable. It is the contract of suretyship expressed in the terminology of the law merchant, and modified perhaps in some respects thereby. When, therefore, it appears by the plaintiff's allegations that he delivered cotton to S. on the guaranty of the defendant; that the defendant represented that S. would account for it, and that plaintiff still holds S. liable for it, a case is presented within the statute of 1858, which forbids the reception of parol evidence to prove a promise to pay the debt of a third person. R. S. 1870, 2820. *Graves v. Scott*, 690.
30. An unconditional offer to pay a debt is such an acknowledgment as will interrupt the current of prescription. Such offer or acknowledgment may be proved by parol evidence. *Wansley v. Willis*, 703.
31. A promise to pay the debt of a third person can not be proved by parol testimony. *Merz v. Labuzan*, 747.

EXECUTORS AND ADMINISTRATORS.

1. A dative testamentary executor, who has been appointed according to the laws of another State of the Union, in place of the executor named in the will, who declines to serve, can not be appointed dative testamentary executor to administer property of the succession situated in this State. In such a case the public administrator for the parish where the property, belonging to the succession, is situated, must be appointed to administer it. Revised Statutes of 1870, section 3677. *Succession of Milton Taylor*, 22.
2. The appointment of the public administrator to take charge of a succession, pending a contest for the administration, is provisional only, and the public administrator is without authority, nor can the court that has made the appointment, authorize him to sell the property or pay the debts of the estate. *Succession of Thomas Supple*, 24.
3. To enable a creditor to have an administratrix of a succession removed from office, it must be alleged and shown that the creditor has been injured by the misappropriation or maladministration (by the administratrix) of the property or funds of the succession. *Succession of Decuir*, 166.

EXECUTORS AND ADMINISTRATORS—Continued.

4. The acknowledgment (by the executor) of the correctness of notes held by a creditor of the succession, need not be made on the notes themselves, but may be made on a separate piece of paper. Such acknowledgment, to work an interruption of prescription, must in all cases be made in writing.
Warren v. Childress, 184..
5. The authority of an executor to carry on a plantation, furnish it with supplies, etc., must be shown, otherwise the estate is not liable for the supplies furnished by a merchant under his direction.
Miltenberger v. Taylor, 188.
6. A testamentary executor can not sue for the nullity of a sale of real property, made by the testator, on the ground that the sale is fraudulent and simulated, and made for the purpose of defrauding the creditors of the deceased. The testamentary executor only stands in the place of and represents the testator; he can, therefore, bring no action, nor stand in judgment in any case where the testator, if alive, could not.
Van Wickle v. Calvin, 205.
7. Where an administratrix has been appointed after a contest for the position, she is allowed ten days to execute her bond and qualify. The appointment of another party by the judge before the ten days has elapsed, is therefore null and of no effect.
Succession of Horlor, 396.
8. Where several parties apply for the appointment of dative testamentary executor, the judge may exercise a sound legal discretion in making the appointment, and if the record discloses nothing showing that the discretion has been improperly exercised by the judge *a quo*, his judgment will not be disturbed on appeal.
Succession of Huie, 401.
9. An executor or administrator has no power to bind the estate by giving notes, signed officially, for debts contracted during the time of the administration. If, therefore, the administratrix give her notes in favor of a merchant for supplies furnished to carry on the plantation after the succession is opened, she may be held personally liable thereon, but the estate she represents is not bound, because she has not the authority by virtue of her office of administratrix to contract such debts on behalf of the estate she represents. 21 An. 286. *Carroll, Hoy & Co. v. Davidson*, 428.
10. If the administrator has filed a classification of the debts due by the succession, and has obtained an order of the parish court homologating the same, then a creditor whose account has been thus homologated and ordered to be paid out of the funds in his hands, may, on his refusal, cause execution to issue from the parish court, notwithstanding the amount is above five hundred dollars or above the ordinary jurisdiction of the parish court, the jurisdiction of the parish court being unlimited in purely probate matters.
Ray v. Tatum, 592.

EXECUTORS AND ADMINISTRATORS—Continued.

11. A purchaser of a tract of land at probate sale made under an order of a court of competent jurisdiction, directing a sale of *all* the property of the succession, is not affected by the failure of the executor to have such land placed on the inventory or to have it accurately described on the inventory. *Mitchell v. Levi*, 630.
12. If it appear that gross negligence and want of due precaution has characterized the actions of the executor in the manner of conducting the administration of the estate he represents to an extent which amounts to a fraud on the estate, yet the purchaser at probate sale, in good faith and unconnected with the fraud, is not affected thereby if it be shown that the order under which he purchased emanated from a court of competent jurisdiction, and the proceedings thereunder were regular upon their face. *Ib.*
13. The fact that one of two law partners is the executor of an estate, does not disqualify the other member of the firm from acting as the agent of a creditor of the estate. *Ib.*
14. An administrator is personally responsible to the heirs for money which he has received, belonging to the estate he represents, if he pays the same to a person not authorized to receive it.
Succession of Marr, 718.
15. An administrator of an ancillary estate situated in Louisiana, whom it is shown has acted in good faith, ought not to be inflicted with the stringent penalties denounced by statute against delinquent administrators. *Ib.*
16. The administrator, in answer to a suit to enjoin the sale of property inventoried as belonging to the succession, may allege and show the simulated character of the plaintiff's title. If, however, it be shown on trial that the plaintiff's title was fraudulent, but not simulated, then and in that case the administrator could only have its nullity pronounced by direct action.

Succession of Grant, 741.

EXECUTORY PROCESS.

1. In this case a mortgage creditor, represented by his executor, obtained an order of seizure and sale of the property mortgaged. Another mortgage creditor took a devolutive appeal from the order of seizure on the ground that there was no authentic evidence of the appointment as executor; that the executor was not authorized under the will to dispose of the property, and that the sum for which the order was issued included compound interest. Held—That if these facts were admitted the third party, a mortgage creditor, would not be injured, because if he held a superior mortgage he would be entitled to the proceeds of the sale in full satisfaction thereof; that if his mortgage was inferior in rank he would be entitled to the residue after paying the older mortgages; that,

EXECUTORY PROCESS—Continued.

not being injured by the sale of the property mortgaged, he could not therefore, as a third party, obtain an appeal from the order of seizure and sale.

Sompayrac v. Hyams, 273.

2. In a suit by executory process to enforce the payment of mortgage notes shown to be for a mixed consideration, partly for lands and partly for slaves, an injunction taken out to prohibit the sale on the ground that the consideration of the notes is illegal, will be dissolved to the extent of the consideration shown to be for the lands, and maintained for that portion of the consideration which is shown to be for slaves. 21 An. 757, 771.

Osborn v. Osborn, 476.

3. Before executory process can be issued on notes executed by an agent, authentic evidence of the agency must be shown.

Gaudox v. Blaque, 520.

4. In the examination of an appeal taken from an order of seizure and sale, the appellate court can only determine whether the evidence presented to the judge *a quo* is sufficient to authorize the fiat.

Parkerson v. Grundy, 530.

5. In executory proceedings to enforce the sale of mortgage property belonging to an absentee, service of notice of the order of seizure and sale upon the attorney appointed by the court to represent the absentee is sufficient to interrupt the current of prescription.

Williams v. Douglas, 685.

6. If a mortgage debtor invokes the conservatory remedy of injunction to stay the sale of the property mortgaged, without showing any valid or legal excuse therefor, he will be condemned to pay to the seizing creditor the damages which the law has provided in such cases.

Ib.

EXPROPRIATION.

1. In a proceeding for the expropriation of private property for the use of a railroad corporation, the plaintiff is entitled to notice of the award of the commissioners, in order that it may show that the award is extortionate in amount. In such a case, judgment that has been rendered on the report of the commissioners, without giving notice to the railroad company, will be reversed on appeal, and the case will be remanded for service of the rule and for further proceedings according to law.

New Orleans, Mobile and Chattanooga Railroad Company v. Bougere, 803.

EXEMPT FROM SEIZURE.

1. A right resulting from a contract of labor between the State on the one hand and a private citizen on the other, is not liable to seizure for the debts of the latter. The contract entered into between the State of Louisiana on the one hand and Richard Tay-

EXEMPT FROM SEIZURE—Continued.

lor on the other, whereby the said Richard Taylor bound himself under bonds to widen and deepen the New Canal and to keep it in repair for a given time, for which the said Richard Taylor is to have and enjoy the tolls arising from the use of said canal and shell road by the public, is a contract resulting from the obligation to perform the labor of widening, deepening and improving the canal, and the tolls arising therefrom are not, therefore, liable to seizure by the judgment creditors of the said Richard Taylor.

Charles Case, Receiver of the First National Bank of New Orleans, v. Richard Taylor, 497.

FRAUD.

1. In an action by the creditors to annul a sale made by the sheriff of the debtor's property, on the ground that the purchaser is an interposed person who took the title fraudulently for the purpose of defeating them, the declarations of the debtor before the sale, made out of the presence of the purchaser, which are not shown to be brought home to him before the sale, are not sufficient to establish that he purchased the property for the debtor. Fraud may be proved by parol evidence, but unless the fraudulent declarations of one of the parties is shown to have reached the other party, and to have been the motive for his action, the transaction will not be set aside on the ground of fraud.

Trezevant v. Courtney, 628.

GARNISHMENT.

1. Plaintiff took a rule on defendant to cancel a note and erase a mortgage given to secure its payment. The defendant set up a reconventional demand for money which he was forced to pay as garnishee in a suit against the plaintiff in rule. To this form of proceeding no exception was taken. Held—That the plaintiff could only be condemned to pay the amount on the reconventional demand which the defendant was obliged to pay as garnishee.

Carvin v. Drumm, 178.

2. No judgment can be legally rendered against the wife on interrogatories that have been served on her as garnishee, until she has been authorized by her husband or the judge to appear and make answer to the interrogatories. A judgment taken against her, *pro confessis*, without her being properly authorized, is null.

Delacroix v. Hart, 192.

3. In garnishment suits, the jurisdiction is attested by the original demand. If, therefore, the claim against the debtor is above five hundred dollars, the Supreme Court will have jurisdiction of the appeal from a judgment in the garnishment process.

Leverich v. Dulin, 505.

GARNISHMENT—Continued.

4. A judgment that has been rendered against a party as garnishee, after he has been eliminated from the suit, is void and of no effect.
Ib.

5. A garnishee who has taken an exception to the right of the plaintiff to require her to answer interrogatories, may appeal from the judgment overruling the exception if the amount involved is sufficient to give the appellate court jurisdiction. The fact that the garnishee subsequently answers the interrogatories which disclose a liability, can not be construed into a confession of judgment so as to defeat the right of appeal.

State ex rel. Tureaud v. Parish Judge of Ascension, 717.

6. The salary of a State officer can not be seized and sold for debt, nor can a garnishment process issue directing the State Auditor to warrant in favor of a seizing creditor of an officer of the State for the amount of salary due him.
Wild v. Ferguson, 752.

HOMESTEAD.

1. The act of the twenty-second December, 1865, giving to every head of a family the right to hold exempt from seizure by his creditors one hundred and sixty acres of land and other personal effects as a homestead, does not apply to succession property. Therefore, if such property has passed into the succession, it may be sold for the payment of the debts thereof, notwithstanding this statute.
Burnett v. Walker, 335.

HUSBAND AND WIFE.

1. The husband who joins with and authorizes the wife to execute a mortgage on her paraphernal property for the purpose of improving it, can not afterward, when the mortgage is sought to be enforced, set up by way of defense that the property mortgaged was community property, and the wife was without the power or authority to encumber it. Having signed the mortgage himself, he can not be permitted to deny or gainsay his own solemn act.
Stewart v. Boyle, 83.
2. In a suit by executory process to foreclose a mortgage executed by the wife, on her separate property with the authorization of her husband, the authorization of the wife by the husband to defend the proceedings is not necessary.
Ib.
3. If the husband be indebted to the wife for paraphernal property belonging to her, which he has received, he may give her in payment for such property other property of his own, and such property so given in payment is not liable to seizure for the debts of the husband, but is to be regarded and treated as her separate property.
Barus v. Bidwell, 163.
4. A written agreement by which the wife separated in property from her husband is to become the purchaser of property seized

HUSBAND AND WIFE—Continued.

under judgments against her husband, and to execute her notes to the respective judgment creditors for the amounts due, is admissible in evidence on the trial of a suit to enforce payment of the notes or note thus given by the wife. Parol evidence is also admissible to show the circumstances and manner of completing the agreement, as set forth in the written instrument.

Lehman v. Barrow, 185.

5. The wife, separated in property from her husband, has the right to become the purchaser of his property under seizure at a price sufficient to cover the judgment against him, and the note given by her, with the authorization of her husband to sign it, in payment for the price, is binding upon her, notwithstanding it went to the payment of the debts of the husband. *Ib.*

6. The husband is not bound on a note which he has signed only for the purpose of authorizing his wife to make and sign it, even though it be a joint and several obligation. The words, "we jointly and severally promise," are qualified and restricted by the word "authorizing," placed before the signature of the husband to the note. *Ib.*

7. A notarial act executed by the wife, whereby she agrees to postpone the rank of her mortgage on the property of her husband to that of a creditor, is null and of no effect as against her, if the evidence shows that she signed it under threats made by her husband.

Succession of Smith v. Smith, 240.

8. The law provides that whenever, owing to the mismanagement of the husband, the dowry of the wife is in danger, or when the disorder of his affairs induces the wife to believe that his estate may not be sufficient to meet her rights and claims, she may petition the court for a separation of property. Civil Code, 2425. In such a case, the judge must hear evidence to show that the belief of the wife that her rights are in danger has a rational basis, before he grants the order, but no particular kind or quality of evidence is required. Evidence that the husband is possessed of a large estate, sufficient in amount to cover the wife's claims, if it be shown on the other hand that he has met with heavy losses, and is indorser, etc., for large amounts, will not justify the court in rescinding or annulling an order which has been granted separating them in property.

Caulk v. Picou, 277.

9. The husband can not maintain an injunction to stay the sale of his property, seized to satisfy a judgment rendered against him, on the ground that before the seizure he had transferred the property seized to his wife in payment of a debt which he owed her. In such a case, if the wife, whom it is alleged by the husband is the owner of the property seized, does not complain, the husband can not.

Barus v. Bidwell, 296.

HUSBAND AND WIFE—Continued.

10. A sale of a plantation by the husband to the wife whereby the wife, in payment, credits her judgment against her husband for a portion of the price and for the balance she assumes and obligates herself to pay certain mortgages which her husband has placed on the plantation, is absolutely null and void, and conveys no title whatever to the wife, because the wife is prohibited from assuming or contracting to pay the debts of her husband. C. C. 1790.

Oliver and Husband v. Dayries, 439.

11. In such a case the obligation of the seller is vitiated as well as that of the buyer, and the fact that a portion of the price of the place paid by the wife was permitted and was legal, will not render valid the sale so as to drive the mortgage creditors to the direct action of nullity. *Ib.*

12. The seizure and sale by the mortgage creditors of the husband can not, therefore, be stayed by the writ of injunction taken out by the wife, founded on her ownership and title to the plantation as transferred to her by her husband. *Ib.*

13. In a suit by the wife for a separation from bed and board, coupled with a demand for a moneyed judgment, founded on the allegation that the husband had received and converted to his own use certain funds which she had inherited from the estate of her father and mother, the marriage contract showed that from the date of the marriage the wife retained the administration of her separate estate, and the evidence showed that the funds derived from the succession of her father and mother had been invested in certain property in her name and for her benefit. Held—That under this state of facts, she was not entitled to a moneyed judgment against her husband for moneys alleged to have been received by him.

Rice v. Rice, 518.

14. The wife who, in payment or part payment of her judgment against her husband, received a transfer of a claim which he alleges to be due him, acquires only such rights thereto as the husband had. A debtor who allows his property to be sold under execution, and the proceeds to be applied in satisfaction of the writ, is thereby concluded from his right of action to recover the proceeds of the sale on the ground that the consideration of the debt, to pay which the property was sold, was illegal. Therefore, in this case, the wife being the transferee of the husband's claim to the proceeds of the sale of his property to pay a debt against him, on the ground that the consideration of the debt was the sale of slaves: Held—That inasmuch as the husband had made no opposition to the sale and application of the proceeds to the payment of his debt, he was barred from afterward setting up a claim thereto, and the wife, being his transferee, could only exercise

HUSBAND AND WIFE—Continued.

such rights as her transferrer had conferred upon her, and that she could not therefore recover. *Wailis v. Citizens' Bank*, 524.

15. The act of 1855, No. 200, p. 254, under which a married woman is authorized to execute a mortgage on her own property by observing the formalities therein prescribed, does not abrogate nor do away with the rules laid down in the Civil Code by which she is authorized, by and with the authorization and consent of her husband, to mortgage her separate property for a debt which inures to her separate use and benefit. 15 An. 94; 21 An. 398; 22 An. 457. *Knight v. Mentz*, 537.
16. The husband is not incapacitated from testifying that the debt for which his wife gave a mortgage on her separate property, inured to her separate and sole advantage. *Ib.*
17. A judgment of separation of property between the husband and wife is void if not followed by a *bona fide* execution thereof, either by payment so far as the husband's estate can meet her demands, which must appear by authentic act, or by an uninterrupted suit to enforce payment. *Spires v. McKelvy*, 571.
18. If the wife has obtained judgment of separation of property from her husband, which has become void on account of non-execution thereof, she is at liberty to disregard it entirely and commence proceedings for a separation *de novo*. 6 An. 213. *Ib.*

IMMOVABLES.

1. Materials that are for the first time collected together for the purpose of erecting a building do not form a part of the realty, nor do materials that result from the demolition of a building any longer retain their character of immovables and form a part of realty; but where a building is torn down with the view and intention of remodeling and repairing, and in doing which the same materials are to be used, then and in such case the character of immovables which the materials have acquired by being used in the construction of the first building is not lost, and they are still immovables by destination, because they are intended to be used in the repairing or reconstructing the old building. *Beard v. Duralde*, 284.

IMPUTATION.

1. A owed two promissory notes, secured by mortgage on real estate. After the first note was prescribed on its face, the administratrix of the estate of A paid it. B, the holder of both notes, gave up the one which was paid, and resorted to executory process to enforce payment of the other note, which was not prescribed. A enjoined the sale on the ground that, having paid a certain amount to the holder of the two notes after the first one was prescribed on its face, it became the duty of the holder to impute the pay-

IMPUTATION—Continued.

ment thus made to the other note, not prescribed, and to enforce payment of which the executory proceedings are now taken. Held—That in a case like this the burden of showing that the payment was made through error, and was intended to be applied to the payment of the note that was not prescribed, devolved on the debtor, and not on the holder of the note.

Harrison v. Dayries, 216

INJUNCTION.

1. Where it is shown that an interlocutory judgment, dissolving an injunction, may work an irreparable injury, the party plaintiff in injunction is entitled to have it reviewed on appeal. Therefore, if the judge *a quo* refuses an appeal from such interlocutory decree, the Supreme Court will, on application, issue a mandamus, compelling him to grant the appeal and send up the record.

State ex rel. Bene v. Judge of Fourth District Court, 151.

2. A motion is made to dissolve the injunction in this case on the ground that there was no affidavit made, as required by law. It appears that the order granting the injunction was rendered by the district judge. It appears, also, that the affidavit was made on the same day and signed by the party making it, and that both the affidavit and the order were written on the petition, the affidavit immediately preceding the order. The words "sworn to and subscribed before me," etc., are not followed by the signature of the judge. The order, which recites: "The foregoing petition and affidavit being considered," etc., is signed by the judge. Held—That the non-appearance of the judge's signature to the *jurat* was a mere omission; that the signing of the order of injunction, which made special reference to the petition and affidavit, was one continuous act, and that the judge acted on the affidavit as having been made before him. 12 Rob. 132.

Lewis & Gist v. Daniels, 170.

3. An injunction will not be set aside for informality or irregularity in issuing it, if it is manifest from the record that the plaintiff in injunction would be immediately entitled to another writ in case the one which had been granted, were dissolved. 12 An. 92; 18 An. 111; 21 An. 324. *Ib.*

4. An injunction will not lie to stay the execution of a judgment on the allegation that the judgment has been novated by giving a note, if the evidence shows that the note was placed in the hands of the judgment creditor before the judgment was obtained and that the judgment creditor has offered to return it before execution was ordered. In such a case, the injunction will be dissolved, with damages against the plaintiff in injunction and his surety on the bond *in solido*.

Sallis v. McLearn, 192.

INJUNCTION—Continued.

5. In an appeal taken from a judgment dissolving an injunction without damages, the surety on the injunction bond having no interest in the appeal is not a necessary party thereto; therefore, the appeal will not be dismissed because the security on the bond is not made a party. *Lane v. Roselius*, 258.
6. The effect of a judgment as between codefendants must be construed with reference to the pleadings and the nature of the obligation declared upon. Therefore, if the obligation sued upon be not solidary as to the drawers, yet if the acceptor is bound unconditionally for the whole debt, he can not maintain an injunction to restrain the sale of his property to pay the same on the ground that his codebtors are not being pursued for their share, even though they be not bound *in solido*. *Barus v. Bidwell*, 296.
7. The husband can not maintain an injunction to stay the sale of his property, seized to satisfy a judgment rendered against him, on the ground that before the seizure he had transferred the property seized to his wife in payment of a debt which he owed her. In such a case, if the wife, whom it is alleged by the husband is the owner of the property seized, does not complain, the husband can not. *Ib.*
8. The writ of injunction will not lie to restrain the owner of a plantation from seeking to annul and set aside a contract with another person, on the allegation that under the terms of the contract the agent has the exclusive right to control the plantation. In such a case the agent has his action against the principal in damages for violations of the contract, but he can not prohibit him from proceeding by the process of injunction. *Seiler v. Fairer*, 397.
9. In the suit of one partner against another, to compel the liquidation and settlement of a commercial partnership, under the allegation that a third person (who, it is admitted, is not a partner, and is in no manner interested in or connected with the partnership affairs), is the possessor of real estate, under a title translativ of property from the partner who is called to account, it was held that the writ of injunction could not be legally issued against such third possessor under such title, restraining him from using and enjoying his property, pending the suit for a settlement of the partnership, because in the first place, it is not established that the partnership is indebted to the complaining partner, and therefore he has no right of action against such third possessor, and consequently is without the right to seek the conservatory writ of injunction. *McKee v. Griffin*, 417.
10. An act of sale of personal property, consisting of goods, wares and merchandise in a store, in block, without fixing a price or de-

INJUNCTION—Continued.

livery, is null as against a seizing creditor, and a third party who claims to have purchased such goods before the seizure, who resorts to the equitable remedy of injunction to stay the sale thereof on the ground of ownership in himself under his purchase, will be condemned to pay the highest rate of exemplary damages for his abuse of the equitable remedies which are given by the law to enable parties to protect themselves against unjust attacks.

Pendleton v. Eaton, 435.

11. Defendants obtained injunctions from the courts of Louisiana prohibiting all other persons from selling anchor oil in the State, predicated on the ground that the exclusive right to sell said oil within the State, which has been patented under the patent laws of the United States, belonged to them. The injunctions were dissolved on the ground that no patent for the anchor oil was shown. Held—That the defendants, who had enjoined the sale of a certain kind of oil within the limits of the State, on the allegation that they held the patent and exclusive right to sell such oil, and having failed on trial to show their exclusive right or the patent, they and their sureties on the injunction bonds were liable *in solido* for the damages caused by the illegal injunctions thus obtained.

Wentzel v. Robinson, 452.

12. This is an injunction suit to prevent the enforcement of a mortgage on a plantation sold by defendant to plaintiff, by written notarial act of sale, on the ground that the consideration of the notes given by plaintiff to defendant was for the price of the sale of persons (slaves). On the trial the plaintiff offered parol evidence to show that the consideration of the notes on which the order of seizure and sale of the land had issued was the price of the sale of persons (slaves). The defendant likewise offered parol evidence to show that the consideration of the notes sued upon was not the price of the sale of persons (slaves), but were given for a part of the price of the sale of the land (plantation), which was objected to by the plaintiff on the ground that parol evidence was inadmissible to explain, contradict, vary or modify a valid written act of sale. Held—That although the rule is well established that parol evidence is not admissible to explain, contradict, vary or modify a valid written act of sale, yet, in the present case, there being no issue before the court in relation to the contract evidenced by the written notarial act of sale, and the object of the defendant in offering the testimony was not in aid or explanation of the written instrument, but was offered to controvert the same class or kind of testimony which had been offered by the plaintiff, it should, therefore, have been admitted for that purpose.

Stackhouse v. Zunts, 481.

INJUNCTION—Continued.

13. Under article 303 of the Code of Practice, an injunction will lie to restrain the enforcement of a judgment that is null and void because it was rendered in vacation or out of term time, and the injunction will continue pending the appeal from such judgment.
Hernandez v. James, 483.
14. As a general rule, an injunction will lie in all cases where the act complained of, if committed, would give rise to an action of damages. *Ib.*
15. A possessor of real property under a title at probate sale applied for a writ of injunction against the heirs, who claim the same, on the allegation that he was the owner. On trial of the motion to dissolve the injunction, it was shown that all the formalities had not been observed by the administrator in making the sale of the property, and that the purchaser was not therefore in such a case entitled to the writ of injunction: *Casanave v. Spear*, 519.
16. A judgment debtor who refuses to point out property when demand is made by the sheriff, thereby loses the right given him to point out property to be seized under execution. C. P. 646.
Derville v. Hayes, 550.
17. The fact that the property of the judgment debtor has been seized, if not taken possession of by the sheriff, will not entitle him to an injunction to stay the sale. 9 Rob. 182. *Ib.*
18. An injunction will not lie to stay the sale of property under execution on the ground of inaccuracies in the description, if they were not such as could have deceived the judgment debtor. *Ib.*
19. The husband can not give personal property to his wife in payment of her judgment against him after a seizure by his judgment creditor has been made. But if the sheriff, in the execution of a judgment against the husband, fails to take the property into his possession, and the husband afterward gives it to his wife in payment of her judgment against him, then and in that case the wife can successfully enjoin the sale, because no legal seizure was made at the time of the giving in payment. *Ib.*
20. If a party has acquired a domicile in one parish, and removes therefrom to another parish, he may be sued and cited in the parish of his former domicile within one year after he removes therefrom, unless he has by public declaration in the manner provided by law declared the place of his domicile. An injunction will not lie to stay the execution of a judgment that has been rendered by the confession or consent of the attorneys of record to the suit, if the evidence shows that the attorneys were authorized to file the answer which formed the basis of the consent judgment. Nor can the action for the nullity of such judgment be maintained. *King v. Watts*, 563.

INJUNCTION—Continued.

21. An injunction will not lie to restrain the execution of a judgment on the ground that it contains illegalities which affect the validity of the judgment itself. *Per curiam*: If it be conceded that the wife, separated in property from her husband, can attack a judgment that has been confessed by her for a debt which she has contracted with the authority and sanction of the judge under the act of 1855, then and in such case she must proceed by direct action to annul it. *Bell v. Francke*, 599.
22. An injunction that has been issued by the parish judge, acting in the place of the district judge, will not be dissolved on that ground, if it be shown that the district judge was absent from the parish at the time. The amount of the bond to obtain an injunction to stay the execution of a judgment must be fixed by the judge who grants the order. In an injunction suit, the surety on the bond is a party to the suit, and is bound by the allegations in the petition, the affidavit, etc., the same as the principal. *Green v. Huey*, 704.
23. The issuing of a writ of *fiery facias* on a judgment against the city of New Orleans is prohibited by statute. An injunction will therefore issue restraining the execution of such writ if it has already issued. *City of New Orleans v. Luleff*, 708.
24. An injunction that has issued to restrain other parties from erecting a street railroad on a particular piece of ground, predicated on the alleged exclusive right on the part of the petitioner, will be dissolved and set aside if it be not shown that he has such exclusive right. The fact that the vendor of the petitioner had acquired the exclusive right from the city of New Orleans to build a street railroad over the neutral ground on Canal street, and afterward abandoned it, will not of itself confer the exclusive right upon a third party who may obtain permission from the city to build a road thereon. *City Railroad Company v. Crescent City Railroad Company*, 759.
25. The judge *a quo* is vested with discretionary power and authority to dissolve an injunction on bond. The writ of mandamus will not therefore issue from the appellate court directing the judge *a quo* to dissolve it on bond. *State ex rel. New Orleans and Havana Steamship and Lottery Company v. Judge of the Eighth District Court*, 766.
26. Real estate in the possession of a third party under a recorded title ostensibly valid can not be seized by a judgment creditor of his vendor, under the allegation of fraud, until the title itself has been set aside by a direct action. An injunction will therefore lie in favor of such third possessor restraining the seizure and sale by the judgment creditor. *Payne v. Graham*, 771.

INTEREST.

1. Where no stipulation for interest is made in the agreement, only legal interest can be recovered on the amount found to be due. The fact that a note pledged as collateral security bears eight per cent. interest per annum, does not entitle the creditor to that rate of interest on an obligation that only draws five per cent.

Stewart v. Dranguet, 201.

INTERVENOR.

1. In this case a horse was in the possession of the sheriff under a sequestration issued at the suit of *Ware & Son v. Wilson*, in the Second Judicial District Court, parish of Jefferson. Burnett intervened and claimed a privilege on the horse. The sheriff, with the consent of the intervenor, transferred the horse to a livery stable in New Orleans for safe keeping. The suit of *Ware & Son* was, by consent, transferred to the Sixth District Court, parish of Orleans. While this suit was pending and the horse under seizure, the intervenor brought a separate action in the Fifth District Court, parish of Orleans, and obtained judgment on default, on which he caused the horse to be seized. Held—That the intervenor, having consented to the transfer of the horse to New Orleans by the sheriff, and having caused a second seizure to be made while he was still a party to the suit in which the first seizure was made, he could not question the validity of the possession of the sheriff under the first seizure and all that he could effect by his execution was to levy on the property in the possession of the sheriff, subject to the first seizure.

Michel v. Sheriff Parish of Orleans, 53.

2. The proceedings instituted against the Auditor of the State to compel him to warrant in favor of J. O. Nixon, under the act of the General Assembly passed March 1, 1871, No. 32, entitled "An Act for the relief of J. O. Nixon, late Public Printer," is a suit, and the State of Louisiana has the right to intervene to prevent her agent from being compelled to do an act which she avers is unauthorized by law. The State has, therefore, such an interest in the success of the defendant as will authorize her to intervene in the suit. 22 An. 366.

State ex rel. Salomon & Simpson v. Graham, 403.

3. Intervention is not the remedy for a third party who claims the ownership of property that has been released from seizure by a bond given by the defendant. In such a case the property should be pursued in the hands of the defendant. A proceeding *in rem* can only be maintained where a privilege is shown to exist on the property seized.

Burbank v. Taylor, 751.

SEE PRIVILEGE.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. Obligations, acquired subsequently to the insolvency, can not be pleaded in compensation by the debtor of the insolvent.

Case v. Cannon and McCan, 36.

2. Where judgment has been given in the court below for more than is demanded in the petition, it will be reduced on appeal to the amount demanded, and the plaintiff will be condemned to pay the costs of the appeal. *Ib.*

3. In case of insolvency, compensation can not take place, if the debtor of the insolvent acquires the claim proposed to be compensated after the failure of the insolvent. *Case v. Cannon*, 112.

4. A surrender by an insolvent and the acceptance of the cession, vests the title to the property surrendered in the creditors. The insolvent can not, therefore, after the surrender is made, set up any claim to the property surrendered, founded on the charge that the property surrendered has been fraudulently sold or disposed of by the syndic of the creditors. The insolvent, having parted with all interest in the property by the surrender, can not be heard to complain of the illegal, fraudulent or simulated sale thereof by the syndic. He can not, therefore, maintain an action for the property which he has surrendered, against the purchaser at syndic's sale, on the ground that the sale made by the syndic was simulated, because if the sale by the syndic be shown to be simulated and null, that nullity would not inure to the benefit of the insolvent. *Steib v. Kaiser*, 337.

5. A mortgage creditor who participated at a meeting of the creditors of an insolvent debtor and made no opposition to the homologation of the proceeding as agreed upon, is, after the homologation by the judge, precluded from requiring a sale of the property to be made for his benefit on terms different from those agreed upon at the meeting of creditors. But if a mortgage creditor be not present at the meeting of creditors, and be not represented therein, then, and in that case, he may, notwithstanding the deliberations have been homologated by the judge, cause the property, or a sufficient amount thereof to pay his debt, to be sold for cash.

Frere v. Robertson, 541.

6. A *datien en paiement* by an insolvent to one of his creditors with a view of giving an undue advantage or preference over the other creditors may be annulled at the suit of the other creditors, but in such case, if the debt for which the property has been given in payment be a just and valid claim, then and in that case he shall only lose the advantage endeavored to be secured by such contract.

Merchants' Mutual Insurance Company v. Louisiana State Mutual Insurance Company and The Citizens' Mutual Insurance Company, 800.

SEE BANKRUPTCY.

INSURANCE.

1. The insured is bound by all the conditions and restrictions clearly written or printed in the body of the policy. Therefore, if he has kept certain combustibles and inflammable oils stored in the building insured which were specially excepted from risk by the insurers, and fire occurs, he can not recover the amount or any portion of the insurance from the company. In such a case the insured will not be permitted to urge that the exceptions were not specially pointed out to him at the time the insurance was effected, nor will the fact that such exceptions are unusual among the insurance companies in the city of New Orleans avail him. Having accepted and taken possession of the policy, he is presumed to be familiar with all its clauses and provisions.

Reeve v. Phoenix Insurance Company, 219.

2. The steamboat Mars took on board at New Orleans, in 1861, a cargo of sugar consigned to Babbitt, Goode & Co., at Cincinnati, Ohio. The sugar was insured in favor of the consignees in the office of the Sun Mutual Insurance Company of New Orleans. When opposite the town of Helena, on the Mississippi river, the boat was fired at by a cannon shot and brought to the bank; a mob took possession of the boat and cargo of sugar, which became a total loss to the owners. The insurance company resists the payment of the policy on the grounds: First—That the owner of the cargo not having made an abandonment, and the cargo not having been an immediate total loss, they were not entitled to recover on that account. Held—That so far as the owners were concerned, from the moment the sugar was taken possession of by the mob it became a total loss to them, and no act of abandonment on their part was necessary to entitle them to recover on the policy. Second—That the taking of the sugar at Helena was a capture or detention by the enemies of the United States, and that such capture or detention was not among the perils insured against. Held—That it having been established by the testimony that the persons at Helena who took forcible possession of the sugar were not acting under any legally constituted authority of any State or government whatever, but were acting simply as a mob, the underwriters could not avail themselves of this defense to escape liability under this state of facts. Third—That the underwriters were not liable because the taking of the sugar, under the circumstances, is not included in either the special or general words of the peril clause of the policy. The perils are as follows: "Of the rivers, fires, rovers, assailing thieves, and all other perils and losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof, by reason of the dangers of the river."

INSURANCE—Continued.

Held—That the taking of the sugar by the mob at Helena was covered by the general terms of the peril clause in the policy; that while the mob at Helena could not properly be classed as assailing thieves, because the evidence did not establish that it was done *animo furandi*, yet the acts were of such a character that, if not reducible from the special words of the policy, they were clearly included within the general words at the end of the peril clause.

Babbitt, Goode & Co. v. Sun Mutual Insurance Company, 314.

3. The policy of insurance contained a stipulation as follows: "In case the insured shall have already any other insurance against loss by fire on the property insured, not notified to this corporation and mentioned in or indorsed upon this policy, this insurance shall be void and of no effect." And the insured takes out a second policy in another company on the same piece of property, without giving notice in the manner indicated in the first policy. Held—That by his failure to give notice as stipulated in the first policy, of the second insurance, he forfeited his right to recover on the first policy, the property insured having been destroyed by fire.

Duclos v. Citizens' Mutual Insurance Company, 332.

4. A policy of insurance on the life of a man, taken out in favor of his wife and children, vests the rights to the policy in them from the date of its execution.

Succession of Kugler, 455.

5. The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous conditions or specifications of the hazards. Therefore an act done by the assured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk.

Dittmer v. Germania Insurance Company, 458.

6. In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured without giving notice to the insurers. Held—That, although unbaled hay was not specially excepted from the hazards, yet from its very nature the risk was increased, and therefore it avoided the policy on that ground.

Ib.

7. A discrepancy between the value of goods destroyed by fire, as sworn to by the insured, and the value as proven on the trial in a suit against the company to recover the policy, is not necessarily evidence of fraud against the company on the part of the insured.

Beck v. Germania Insurance Company, 510.

8. Any agreement made between the officers and the stockholders of an insurance company as to the liability of the stockholders on their stock notes, can not affect creditors. A person who has been

INSURANCE—Continued.

regularly appointed liquidator of an insurance company, has the legal right to sue for and stand in judgment in cases where the company are seeking to enforce payment of the stock notes held by the company. *Peychaud v. Hood*, 730.

9. One of the clauses in the policy of a life insurance issued by the Benevolent Aid and Life Insurance Company of Louisiana, was that the insured agreed to pay into the treasury of the association one dollar and twenty-five cents upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French for five consecutive days. Held—That under this clause the assured was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication. That the company could not claim the forfeiture of the policy on that account until thirty days after the last of the five days of publication had expired.

Wetmore v. Mutual Aid and Benevolent Life Insurance Association, 770.

10. In this case the defendants discounted the note of the president of the Citizens' Mutual Insurance Company, and took in pledge as collateral security the stock of the Citizens' Bank, owned by the company. The proceeds of the note went to the benefit of the insurance company, to the knowledge and with the consent of the board of directors. Held—That waiving the question as to whether the president of the insurance company had the right to pledge the stock owned by the company, yet the knowledge of and the acquiescence in the pledge and the receipt of the proceeds by the board of directors, amounted to a ratification of his acts, and the company was thereby bound. *Bezou v. Pike*, 788.

JUDGMENT.

1. The room or place where the court usually holds its sessions is not sacramental. Therefore, court may be opened and held in the room commonly used as a clerk's office, and the decrees and judgments, rendered in such room or place, will not be void on that account. *Smith v. Jones*, 43.
2. Each State of the American Union must give the same effect, within its limits, to the judicial decrees of every other State, which such decrees have in the State where they are rendered. Constitution of the United States, Art. 4, Sec. 1. *McLaren v. Kehler*, 80.
3. Therefore, a judgment, final and conclusive in the State in which it was rendered, is final and conclusive in this State, and a judgment without effect in the State in which it was rendered, is without effect here. *Id.*

JUDGMENT—Continued.

4. The courts of the State in which a judgment of a court of another State is sought to be enforced, have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. And in determining this question the courts of this State will require that the whole record of the proceedings be produced under which the judgment was obtained, in order to show how far it may be conclusive. *Ib.*
5. If a judgment of the inferior jurisdiction of another State has been appealed, and the Supreme Court has pronounced a final judgment thereon, and the judgment or demand passed upon is sought to be enforced in this State, the record or proceedings of the Supreme Court, being the final judgment in the cause, is the proper transcript to present to enable the courts of this State to ascertain how far it is conclusive in the State where it was rendered. *Ib.*
6. The reasons given by the court for judgment form no part of the judgment itself, and the judge of the lower court is not bound by any expressions used by the Supreme Court outside of the decree. Therefore, the decree of the Supreme Court which remands the cause to be proceeded with according to law, can not be taken by the judge *a quo* as finally deciding the questions at issue between the parties. *Davidson v. Carroll, Hoy & Co., 108.*
7. A judgment that has been signed by the judge after the lapse of three judicial days from its rendition, can not be opened by a new trial. C. P. 558. The remedy of the party aggrieved in such a case is by appeal. *Succession of Carraby, 110.*
8. A judgment can not be annulled by direct action for any alleged vice of form in the mode of proceeding. It can only be annulled by such action for one of the three classes of vice of form contained in article 606 of the Code of Practice, viz: First, where the judgment debtor could not stand in judgment; second, where the judgment debtor had not been cited; third, where the court is without jurisdiction *ratione materiæ*. Therefore, if the judge *a quo* has rendered judgment on default in a damage suit without the intervention of a jury as required by article 313 of the Code of Practice, such alleged vice of form may be remedied by appeal, but the judgment can not be annulled by direct action. *Blanch v. Speckman, 146.*
9. In a proceeding under the act of thirtieth of April, 1853. to revive a judgment, the question whether the judgment was rendered on insufficient evidence, can not be inquired into. *Drogre v. Moreau, 173.*
10. The failure to cite a party in her proper capacity in a suit to revive a judgment will render void the judgment of revival. There-

JUDGMENT—Continued.

fore, if it be shown that the judgment of revival is null because no proper and legal citation was served on the defendant, the heirs who have appeared in the suit by way of intervention, may plead that it is prescribed because it has not been revived.

Hopgood v. Dawson, 179.

11. A judgment homologating an administrator's account and tableaux before the lapse of ten days after citation, is a nullity.

Succession of Corderiolle, 297.

12. A judgment recognizing the widow as legatee under the will, must conform to those provisions in the will which award the legacy. *Ib.*

13. A judgment that has been rendered on default on a citation that has been served on a third party, whom it is neither alleged nor shown was the agent of the defendant at the time, is null and void, and the nullity will be so declared on appeal.

Jones v. Jones, 304.

14. Prescription does not run against the action to annul a judgment that has been rendered against a person incapable of standing in judgment. C. P. 612. The confession of judgment by a minor is a nullity which dates from its rendition, and the subsequent acknowledgment of liability under the judgment after he becomes of age, will not render valid the judgment which is void from the date of its rendition.

De Moss v. Cobb, 336.

15. Judgments of the Supreme Court, whether affirming or reversing the judgments appealed from, must be sent back to the inferior court for their execution. C. P. 915. The objection that the execution did not issue on the judgment of the Supreme Court, can not therefore be urged by the defendant in execution.

Wells v. Merz, 392.

16. A judgment that has been rendered on a citation addressed to and served upon a partner of the defendant, in a partnership not alleged or shown to be commercial, is an absolute nullity for want of citation. An hypothecary action to recover real estate encumbered by a judicial mortgage resulting from the recording of such judgment, will, therefore, fail, because the judgment being absolutely null for want of citation, the accessory obligation arising therefrom falls with it.

Stevenson v. Riser, 421.

17. A judgment rendered out of term time, on a rule taken against a surety on an appeal bond, is null and void, although it be rendered in open court and signed by the judge while on the bench.

Hernandez v. James, 483.

18. One judgment creditor may attack the judgment of another creditor of the common debtor and show its nullity on the ground that its consideration was based on an obligation given for the sale of slaves.

Smith v. Henderson, 649.

JUDGMENT—Continued.

19. A judgment that has been given predicated on a slave contract or a slave consideration is null and void, and its enforcement or execution by the court that rendered it is prohibited by article 128 of the Constitution of 1868. Article 149 of the Constitution, which declares all judgments valid and binding which were rendered by the courts of the State during the period of the late civil war, only gives validity to such judgments as were based on a lawful consideration. It having been first settled by the highest judicial tribunal of the State, and afterward enacted into the organic law by the convention which framed the Constitution, that an obligation or contract predicated on slaves was illegal and void, it is therefore held that judgments of inferior courts which were rendered before these decrees and enactments were made, based on contracts or obligations for the sale of slaves, were absolutely null in themselves, and that all such judgments are included in the prohibition of article 128 of the Constitution. *Ib.*

SEE CITATION.

SEE PRESCRIPTION.

JUDICIAL SALE.

1. A seizing creditor can not disregard a sale of an interest in a store, on the ground that it is made in fraud of the rights of creditors.
Austin, Thorpe & Co. v. Da Rocha, Becker & Co., 44
2. Before he can maintain a seizure in such a case, the sale must be declared null by direct action. The rule is different in a case of simulation. In the latter case seizure may be made and the property sold without reference to the sale. *Ib.*
3. A *bona fide* purchaser of an interest in a store, whereby she becomes a partner *in commendum*, does not lose her rights by declining to enjoin the sale of the store which is under seizure. The rights of a partner *in commendum* may be enforced as well by third opposition against the proceeds of the sale. But in the latter case the amount which the property brought at sheriff's sale, will be taken as the basis on which the proceeds are to be distributed, unless it be shown that there was fraud or other ill practices in the sale which led to the sacrifice of the property *Ib.*
4. The privileges existing on the stock of goods for the salaries of clerks, which have been ascertained and recognized by third opposition, will be first paid out of the proceeds of the sale of the property by the sheriff, unless as in this case the partner *in commendum* expressly assumed to pay them. *Ib.*
5. These privileges of clerks for salaries on the goods in the store are not lost or impaired by a simulated sale and transfer of the store to other parties, nor does the taking of a note by a clerk for his salary novate the debt nor destroy the privilege. *Ib.*

JUDICIAL SALE—Continued.

6. The Citizens' Bank became the owner of a plantation by purchase at marshal's sale. The deed of the marshal conveyed so much land, together with all the buildings and improvements, stock, cattle, carts, mules, etc. *Citizens' Bank v. Grand & Co.*, 141.
7. Twelve mules were afterwards seized on the plantation by the sheriff, under a *fieri facias*, at the suit of L. Grand & Co. v. J. C. Patrick, as the property of the judgment debtor. J. C. Patrick was, at the time of the marshal's sale and afterwards, the manager on the place. The bank enjoined the seizure on the ground that the mules seized were attached to the plantation at the time of the sale, and passed to it with the place by purchase. Held—That under this state of facts the burden of showing that the mules, seized as the property of Patrick, were attached to the plantation and passed with the sale thereof as a part of the realty, devolved upon the bank, failing in which the injunction must be dissolved.
Ib.
8. In a suit for partition of a body of land belonging to a succession, the court appointed experts, who reported that the land could not be divided in kind without great injury. Both parties assented to the report, and desired a sale in block. The court *a qua* refused to homologate the report, and decreed a division in kind. The plaintiff appealed, and the defendant admitted in the appellate court that the property could not be divided in kind without serious injury to all parties. Held—That the judge *a quo* should have decreed a sale in order that a partition of the proceeds might be made, but that in making the sale the provisions of article 135 of the Constitution must be observed, and that the lands must be sold in lots of not less than ten nor more than fifty acres each.
Loyd v. Loyd, 231.
9. A sale of real property belonging to a succession, under a decree of a competent court, will not be held to be an absolute nullity on account of irregularities in the mortuary proceedings which lead to the granting the order. In such a case the claimant under an adverse title must first cause the sale to be annulled by direct action. 19 An. 353.
Barbee v. Perkins, 331.
10. A seizure of a judgment or a suit may be made by the sheriff, under a writ of *fieri facias*, without resorting to the circuitous process of garnishment. C. P. 642. The act of 1839, authorizing the garnishment process in certain cases, is only cumulative, and does not interfere with or supersede the regular process of seizure and sale of incorporeal rights under a writ of *fieri facias*. A writ of injunction will not therefore lie to restrain the sheriff from selling a judgment that has been seized under a writ of *fieri facias* on the ground that the judgment which has been seized has not

JUDICIAL SALE—Continued.

been signed by the judge, nor will it lie because an appeal has been taken from the judgment which has been seized. The sale of the interest of a party in a judgment may be made as well at public auction, under the seizure, as by private conventional agreement of the parties. *Safford v. Maxwell*, 345.

11. A purchaser of property sold under an order of the court to affect a partition of community property between the surviving partner and the heirs, may be compelled to comply with his bid, if the record shows that all the formalities required by law have been complied with in making the sale. *Succession of Young*, 336.
12. A judicial sale of cotton made during the late war, while Confederate notes was the only currency in circulation at the place where it was made, is protected by article 149 of the Constitution of 1868. Such a sale is not therefore void because the price bid and paid into the hands of the sheriff by the purchaser was Confederate treasury notes. *Hastings v. Brantley*, 610.

SEE SUCCESSION.

SEE COMMUNITY.

SEE SALE.

JURIES AND JURORS.

1. The fact that a person was called to serve as a talisman on a jury in a criminal trial, who had been exempted from serving on the regular panel, did not vitiate the jury. *Per curiam*: Such a juror might have served on the regular panel, if he had chosen to waive his exemption. *State v. Morningstar*, 8.
2. A juror who does not speak or understand the English language may be challenged by the State, and excluded by the judge, although he be a qualified elector and possess all the legal requisites to constitute him a good juror. The accused is not deprived of any right or privilege by excluding him from the panel. *State v. Push*, 14.
3. A juror who does not understand the language in which the proceedings are conducted, is as much an unfit person to sit on the trial as though he was infirm, or incapable of rendering such services, and the State, as well as the accused, may have him excluded by challenge for cause. *Ib.*
4. A juror who has formed an opinion based on common rumor without any prejudice or bias against the accused, is not disqualified from sitting on the trial. *State v. Caulfield*, 148.
5. After the accused has been indicted and pleaded not guilty, it is too late to urge his right to a preliminary examination before a committing magistrate. *Ib.*
6. Questions of fact, as to whether certain witnesses who testified on the trial, had sworn falsely, can not be noticed on appeal. Constitution, art. 74. *Ib.*

JURIES AND JURORS—Continued.

7. The fact that alcoholic liquors were furnished the jury, to be used by them for refreshment, while sitting on a protracted trial, does not vitiate their verdict, nor is this fact of itself good cause for a new trial. *Ib.*
8. The presence of the sheriff or his deputies in the jury room during the trial is not misconduct, and the sheriff did nothing more than his duty in procuring a change of clothing for the jurors during the trial, which lasted five days. *Ib.*
9. The deposit of the *venire* with the clerk and posting it up in the clerk's office on the first day of the term, are a sufficient compliance with the law requiring it to be filed in the clerk's office on that day. *Ib.*

SEE CRIMINAL LAW AND CRIMINAL PROCEEDINGS.

JURISDICTION.

1. After a suspensive appeal has been granted and the bond has been given and filed, the jurisdiction of the judge *a quo* over the case is limited to testing the solvency and sufficiency of the surety on the bond. 21 An. 152.
State ex rel. Beebe v. Judge of the Second District Court, 31.
2. The judge *a quo* is, therefore, not competent, after he has granted a suspensive appeal and fixed the amount of the bond, to make an order declaring the appeal devolutive only on the ground that the bond is insufficient in amount for a suspensive appeal. But the remedy of the appellant in such a case is by a writ of prohibition, and not by mandamus. 21 An. 113. *Ib.*
3. The judgment rendered in the court below, without the question of jurisdiction having been raised, is no bar to the action of nullity before the same court for the want of jurisdiction. Nor can the dismissal of the appeal by the Supreme Court for want of jurisdiction be urged as *res judicata* against the action of nullity in the lower court for want of jurisdiction there.
Price v. Cummings, 209.
4. If the court has jurisdiction, the informalities prior to a decree of sale of succession property are cured, and the purchaser is protected against such irregularities. But if property be sold under such decree that belongs to another, and does not belong to the succession, then and in that case the owner of such property can not be precluded from showing the facts and recovering his own.
Beckham v. Henderson, 446.
5. The sale of property which has been seized by the Marshal of the United States, under a writ of *fieri facias* which has issued from the Circuit Court thereof, can not be enjoined by a State Court, on the allegation of a third party that the property seized belongs to him, and is not that of the defendant in the suit under which the

JURISDICTION—Continued.

fi. fa. issued. In all cases of this kind the court which issued the original process by which the seizure was made, has the exclusive right to determine its jurisdiction in the case.

Brooks v. Montgomery, 450.

6. From and after the passage of the act creating the Eighth District Court for the parish of Orleans, the other district courts of the parish were divested of all jurisdiction over cases in which exclusive jurisdiction was given to the Eighth District Court. The signing of a judgment in an injunction suit by the judge of the Sixth District Court, after the passage of the act creating the Eighth District Court, is therefore null and without legal effect, because the Sixth District Court was divested of jurisdiction over the case. *Hoyle v. New Orleans City Railroad Company*, 502.

7. The district court has jurisdiction of a cause against a succession if the amount exceeds five hundred dollars, and also to declare that the vendor's lien exists on the property sold to the deceased. But in the settlement of the succession the parish court is not divested of its jurisdiction by such judgment.

Thompson v. Comeau, 555.

SEE STATE COURTS.

LANDLORD AND TENANT.

1. Failure to pay the rent as it becomes due, is sufficient cause to authorize the provisional seizure of the tenant's property. The fact that the landlord has abated former installments of the rent at the request of the tenant, furnishes no reason why he should be deprived of the legal process to enforce its payment promptly in the future.

Shiff v. Ezekiel, 382.

SEE LEASE

LAWS.

1. The act of the General Assembly approved sixteenth of March, 1870, authorizing the payment of the floating debt of the State by the negotiation of State bonds at a fixed rate or by funding the warrants of the State in bonds at a fixed rate, which created a board of liquidators, with power to sell the bonds, not below a fixed rate, within a given time, did not make it peremptory on said board to sell said bonds at that rate, if a higher price could be had, nor did it prohibit the sale of the bonds after the limitation had expired, provided they realized the price fixed in the act. Therefore, the board of liquidators having left to them a discretion as to whether they would sell the bonds or not, and as to the time of sale, can not be compelled by mandamus to exchange bonds authorized to be issued by this act for warrants held by the creditors of the State. The doctrine heretofore announced by this court is reaffirmed in this case—that a mandamus will never issue

LAWS—Continued.

to compel a public officer to perform a ministerial act where the law creating or requiring such duty to be performed by the officer allows him a discretion either in the manner or the matter of doing it. *State ex rel. Burnett v. Warmoth*, 76.

2. A contract made with a levee inspector of a parish to construct a levee, under an ordinance of the police jury, is not affected by the subsequent repeal of the ordinance. *Kennard v. Lafargue*, 168.
3. The act No. 312 of 1855, conferring authority on the police juries of all the parishes of the State to pass all such ordinances as they may deem necessary relative to roads, levees, bridges and ditches, is not repealed by the act of the seventeenth of February, 1866, entitled "An Act to ratify the appointment of levee commissioners previously made by the Governor of the State, and to continue their functions." This act only repealed such parts of the act of 1855 as conflicts with its provisions. Therefore the police jury of the parish of Avoyelles was authorized by the act of 1855, notwithstanding the act of 1866, to pass an ordinance authorizing certain levees within the parish to be built and to bind the parish for the payment of the cost of building the same. *Ib.*
4. The act of the General Assembly of 1865, No. 52, granting to certain individuals named therein the right to cut a canal through the territory of the State of Louisiana and to use the lands contiguous thereto for the term during which the canal is to be enjoyed by the grantees, after which the lands are to revert to the State, is not a giving of State aid within the meaning of article 112 of the Constitution of 1864. Nor is the right given the grantees by the act No. 52 of 1865 to acquire the lands drained by the canal a giving of State aid. This latter clause, conferring on the grantees the right to acquire the lands drained by the canal, only confers a pre-emption or preference on the grantees over other persons to acquire certain lands. This act does not, therefore, violate article 112 of the Constitution of 1864, which was in force at the time it was passed. The act of 1865, No. 32, while it confers certain rights and privileges on the individuals named, does not constitute them a judicial person. It is not, therefore, in violation of article 121 of the Constitution of 1864, which prohibits the Legislature from creating a corporation.

State ex rel. Belden, Attorney General, v. Burgess, 225.

5. The act of the General Assembly of Louisiana, approved February 21, 1870, extending the aid of the State to the New Orleans, Mobile and Texas Railroad Company, is a contract between the State and the company. In granting State aid to this company to enable it to construct the road through her limits, the Legislature was evidently influenced from motives of public policy, and the aid given

LAWS—Continued.

can not therefore be regarded as a simple donation to a private company.

State ex rel. New Orleans, Mobile and Texas Railroad Company v. James Graham, Auditor, 622.

6. The effect of the third amendment to the Constitution of the State, which forbids the increase of the State debt beyond the sum of twenty-five millions of dollars, is not retroactive. The Legislature granted the State aid to the New Orleans, Mobile and Texas Railroad Company from motives of public policy before the adoption of the third amendment to the Constitution, limiting the State indebtedness. Held—That this grant of State aid, being a contract with the company which was made before the amendment to the Constitution was adopted prohibiting the increase of the State debt above twenty-five millions of dollars, and being made in the public interest, this aid can not now be withheld by the State, notwithstanding its indebtedness has reached the limit imposed by the Constitution. *Ib.*

7. If an act of the General Assembly provides that it shall take effect from and after its passage, the fact that it has not been promulgated in the official journal as required by law, will not abridge or affect in any manner the rights acquired under it. An attachment bond which has been given in conformity to law before such law has been promulgated by publication in the official journal, is not therefore void if the law under which it was given directs that it shall take effect from and after its passage, even though the bond be not in conformity with former existing laws on the subject.

Thomas v. Scott, 689.

8. If a law has been regularly promulgated according to the forms of the Constitution, its invalidity will not be examined or passed upon by the judiciary on alleged irregularities or informalities committed by the General Assembly in passing it, nor will parol evidence be received to show that the General Assembly have not complied with the requirements of the Constitution in passing it. An act of the General Assembly will not be declared void because its objects are not set forth in its title, if the title discloses the objects of the act in terms so clear that no one can be misled thereby

State Lottery Company v. Richoux, 743.

LEASE.

1. A lessee can not set up, in defense to a claim for rent, that the building was uninhabitable, and that he has suffered damages to his furniture in consequence thereof. In such a case the lessee was authorized, if the lessor has failed or refused to have the necessary repairs made, and deduct the cost from the rent.

Diggs v. Maury, 59.

LEASE—Continued.

2. A leased a plantation in the parish of Concordia to B for a fixed amount as the rent for one year. In the month of May the lessee sold to a third party all the work animals, carts, plantation supplies, etc. In the month of June following, the lessor caused them to be provisionally seized on affidavit showing that the third purchaser was about to remove them off the place, and defeat his lien thereon for the payment of the rent. The third party, who had purchased the property from the lessee after the lease had been given, intervened, and claimed the ownership of the personal property which had been seized at the suit of the lessor. Held—That the privilege of the lessor for the payment of the rent having attached to the work animals, agricultural implements, etc., before the sale by the lessee to the intervenor, he could not, although he was the owner, defeat the seizure; further, that it not being made out clearly that the sale was genuine and that the intervenor was the real owner of the property, he could not be adjudged to be entitled to the residuum after paying the lien thereon.

Davis v. Thomas, 340.

3. The prohibition to the lessee to sublet the leased premises in a private act of lease not recorded, is not binding on a third party who subleases the premises from the lessee.

Arent v. Bone, 387.

4. The obligation of a lessee to a lessor to keep in repair the premises leased, does not authorize the co-tenant to sue him for damages occasioned by defects inherent in the cistern on the leased premises.

Martin v. Washburn, 427.

5. An agreement by which the leased property has been taken back by the lessor and rolet to another party for a portion of the time of the first lease, will discharge the surety of the first lessee, unless it be shown that he consented to the change. 5 R. 213.

Denourion v. Hodgson & Lytle, 438.

6. This is a seizure of the cotton made on the plantation for the payment of rent stipulated in the lease. The lessee insists that there was an overflow of the plantation during that year, and that there was a verbal agreement of subsequent date to that of the lease that in case of an overflow the lessee was not to pay any rent. The plaintiff showed the lease, and also a settlement at or near the end of the year of all matters between the parties, except the payment of rent, in which nothing was said about the lessee's not being required to pay rent in case of an overflow. The overflow was shown to be only partial, and the crop not a total loss. On the other hand, it was shown by the testimony of the lessee, which was corroborated by two other witnesses, that in case of an overflow he was not to pay rent. Held—That these facts prepon-

LEASE—Continued.

derated in favor of the lessor, who was claiming under the written lease; that the settlement which was made and reduced to writing between the parties, which was corroborated by oral testimony, when taken in connection with the written lease, was stronger than the verbal agreement which the lessee contended was made that he was not to pay rent in case of an overflow.

Clay v. Martin, 470.

7. The possession of the lessee to the premises leased is the possession of the lessor; the lessee can not, therefore, during the time of the lease contest the title of the lessor. A judgment that has been rendered against a party who has not been cited is void, and will be reversed on appeal.

Phelps v. Taylor, 535.

8. A lessor has a superior right to the proceeds of the sale under execution of cotton, mules and other property on the leased premises, for the payment of the rent, to that of the seizing creditor.

Arick v. Walsh, 605.

9. The lessor may take the movable effects found on the leased premises into his actual possession, and retain them until the rent is paid. This right of pledge which the lessor has accorded to him by law on the movables on the premises leased, need not be registered to preserve it. When, therefore, as in the present case, a judgment creditor of the lessee seizes and sells the movable effects on the leased premises, the lessor has the preference on the proceeds of the sale over that of the seizing creditor for the payment of the rent, without reference to whether the pledge in favor of the lessor of the movables on the premises leased has been registered or not.

Ib.

10. The lessor has, as a security for the payment of the rent and the other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased. The obligation by the lessee to repair and to keep in repair the premises leased, gives the lessor a right of pledge on the movables of the lessee found on the place for its faithful performance.

Warfield v. Oliver, 612.

11. In an action for the recovery of rent the burden falls on the lessee of showing that the notary who drew the lease made an error in computing the rent

Berens v. Maristany, 724.

LEGAL TENDER.

1. An obligation to pay a certain amount in gold dollars can not be discharged by paying a like sum in United States treasury notes, although such notes be a legal tender. The Supreme Court of the United States having decided that such contracts can only be legally discharged by their payment in gold, the courts of Louis-

LEGAL TENDER—Continued.

- iana will follow their decisions and give judgment in gold. 7 Wal. 229, 529; 8 Wal. 609. *Lafitte, Dufilho & Co. v. Rivera*, 32.
2. The judgment must, however, be given for gold and not for its supposed equivalent, predicated on the market value of gold, when compared with treasury notes at the date of the contract. *Ib.*

LEGISLATURE.

1. The proclamation of the President of the United States, dated twentieth of August, 1866, declaring that peace existed throughout the United States, is the period at which the late war between the United States and the so called Confederate States terminated. Therefore the work of cutting a canal through the territory of Louisiana, as authorized by the act No. 52, of 1865, which was required by said act to be commenced within four months from the termination of the war which was then going on, was commenced within the time required, if commenced within four months from and after the date of twentieth of August, 1866.
State ex rel. Belden v. Burgess, 225.
2. The Staté, through the action of her Legislature, having thrown obstacles in the way of the completion of the canal which she had authorized certain individuals to construct, can not be permitted to claim a forfeiture of the grant on account of the non-completion within the time. *Ib.*
3. The Legislature can pass no law which impairs the obligations of a contract. The power and right of interpreting laws belong to the judiciary *alone*. Therefore, an act of the General Assembly which assumes to judge when an obligation has been violated or when a right of franchise has been forfeited, is absolutely null, because the Legislature has no power to pass such an act or to sit in judgment in such a case. *Ib.*

LICENSE.

1. A person owning a cotton pickery can not avoid the payment of the license imposed on cotton pickeries by the revenue act of 1869, on the ground that he does not use it except for the purpose of picking and cleaning his own cotton, which he has purchased to sell again. In such a case he is as much liable to the State for the license as though he used it for picking and cleaning cotton for other persons for which he charged a commission.
State v. Hemard, 263.
2. Banks organized under the free banking law of the State of Louisiana are exempt by said act from paying to the State or any of its municipal corporations a license for carrying on the business of banking. The acceptance of the privileges of this law by any individual or company in the State amounts to a contract between

LICENSE—Continued.

such person or company and the State, which can not afterward be infringed or impaired by the State.

State of Louisiana v. Southern Bank, 271.

3. Article seventeen of section three of the revenue law of 1869, which imposes a license on persons engaged in banking under the free banking law of the State, is in conflict with section ten of article one of the Constitution of the United States, and is, therefore, void. *Ib.*

4. An ordinance of the city of New Orleans which fixes the amount of license which each insurance company must pay on the basis of the amount of the premium received by each company is unequal and not uniform. It is, therefore, unconstitutional and void. Constitution, art. 118.

City of New Orleans v. Home Mutual Insurance Company, 449.

5. The license imposed by the municipalities or the State on persons pursuing the same profession, occupation or calling must be equal and uniform; otherwise their payment can not be enforced. *Ib.*

6. Those parts of sections twenty, twenty-one, twenty-two and twenty-three of the revenue law of 1869, which authorize the levying and collecting of a specific tax on drays, wagons, carriages, etc., in proportion to the number of animals used in drawing them, are contrary to article 118 of the Constitution, and are therefore null and void. *State v. Endom*, 663.

Such tax is a license on the particular calling, but if it were not it would still be obnoxious to the Constitution, which requires that all licenses on the same occupation or calling shall be uniform, while the classification according to the number of animals used in drawing any particular vehicle imposes greater or less burdens on one person than another pursuing the same occupation. *Ib.*

SEE TAXES AND TAX SALES.

LIS PENDENS

1. The sale of succession property by the testamentary executor to pay particular legacies, debts, costs, charges of administering, etc., is not inconsistent with the prosecution of a suit for a partition of the succession among the heirs. In the former case the executor has the right to cause the property to be sold to pay the particular legacies, etc., while in the latter the heirs have the right to the action of partition among themselves. Both proceedings may, therefore, be carried on at the same time, without the one being regarded as *lis pendens* with reference to the other.

Succession of Brown, 308.

SEE PRACTICE—*New Orleans v. Walker*, 800.

MANDAMUS.

1. The application of a party to remove a cause to the next Circuit Court of the United States is analogous to a plea to the jurisdiction of the State court, and when granted, the party against whom it is taken has the right to appeal. The case would be different if the application to remove is refused by the court *a qua*. In the latter case, no irreparable injury would follow, and the appeal would not be allowed. *Rosenfield v. Adams Express Company*, 21 An. 233.

State ex rel. Coons v. Judge of the Thirteenth Judicial District, 29.

2. A mandamus will therefore issue, on application, from the Supreme Court directing the judge of the district court to grant an appeal from an order transferring a cause to the Circuit Court of the United States, if the case is in other respects appealable. *Ib.*
3. The act of the General Assembly, approved sixteenth of March, 1870, authorizing the payment of the floating debt of the State by the negotiation of State bonds at a fixed rate or by funding the warrants of the State in bonds at a fixed rate, which created a board of liquidators, with power to sell the bonds, not below a fixed rate, within a given time, did not make it peremptory on said board to sell said bonds at that rate if a higher price could be had, nor did it prohibit the sale of the bonds after the limitation had expired, provided they realized the price fixed in the act.

State ex rel. Burnett v. Warmoth, 76.

4. Therefore the board of liquidators, having left to them a discretion as to whether they would sell the bonds or not and as to the time of sale, can not be compelled by mandamus to exchange bonds authorized to be issued by this act for warrants held by the creditors of the State. *Ib.*
5. The doctrine heretofore announced by this court is reaffirmed in this case—that a mandamus will never issue to compel a public officer to perform a ministerial act where the law creating or requiring such duty to be performed by the officer allows him a discretion either in the manner or the matter of doing it. *Ib.*
6. A mandamus will not lie to compel the board of directors of a street railroad company to collect an installment due by the subscribers on the stock of the company, where by a clause in the charter of the company they have vested in them a discretion as to the time and the manner of making the collection.

State ex rel. Scully v. Canal and Claiborne Streets Railroad Company, 333.

7. As a general rule the writ of mandamus will not lie to compel an officer or a company to do an act coming within the range of their duties, where the law or the charter under which they act has vested in them a discretion to do or not to do it. *Ib.*

MANDAMUS—Continued.

8. The act of the General Assembly, approved March 4, 1871, which authorized the board of liquidators of the floating debt of the State to exchange a certain amount of bonds of the State for warrants on the State treasury at a certain rate of discount, by limiting their power of exchange to a certain amount of bonds, vested in them a discretion as to what warrants they would accept in exchange for the bonds placed in their hands for that purpose. The writ of mandamus will not, therefore, lie to compel them to make a *pro rata* distribution of the bonds in their hands to the different creditors in proportion to the amount of warrants they may respectively hold. 22 An. 318, 611.

State ex rel. Smith v. The Board of Liquidators, 338.

9. The charges of bad faith against the board of liquidators can not be judicially inquired into in a proceeding by mandamus to compel them to do a particular thing *Ib.*
10. Where an interlocutory judgment if erroneous would work an irreparable injury, the party against whom it has been rendered has the right to have it reviewed on appeal. In such a case a mandamus will issue on application, directing the judge *a quo* to grant the appeal.

State ex rel. Simmons v. Judge of Fifth District Court, 713.

11. Act No. 5, of extra session of 1870, approved March 16, 1870, which prohibits the remedy by mandamus against the city of New Orleans and the officers thereof, applies with equal force and effect against any creditor or pretended creditor who seeks by mandamus to compel the administrators of the floating debt of the city to approve all claims without examination which may be presented to such committee to be audited and approved. The administrators of the floating debt being invested, by virtue of their powers as such board, with a discretion to either allow or disallow such claims, can not be compelled by mandamus to allow any particular claim, although it may have been warranted for by one of the corporations now consolidated with and included in the corporation of New Orleans.

State ex rel. Monasterio v. Shaw, 790.

METROPOLITAN POLICE.

1. The act of the General Assembly which created a Metropolitan Police District for the city of New Orleans and took away from the city authorities the management of the police force and vested it in a Board of Metropolitan Police, did not repeal or modify the statute of 1855, re-enacted in 1869, which makes the city liable for property destroyed by a mob or a riotous assembly within the limits of the corporation. The city is, therefore, liable, under this act, for the damage done to property within the corporation, whether the owner of such property be a resident of the city or an absentee.

Williams v. City of New Orleans, 507.

SEE DAMAGES.

MARRIED WOMEN.

1. A married woman is not personally liable on a note executed in *solido* with her husband, when at the time of its execution a community of acquets existed between her and her husband and the latter had the exclusive administration of her paraphernal property. *Trudeau v. Row*, 197.
2. Where there is a community of acquets, and the husband has the exclusive administration of the paraphernal property of the wife, purchases made during the marriage fall into the community, and debts contracted, whether by the husband or the wife, are community debts, and must be discharged by the husband. *Ib.*

SEE COMMUNITY.

MORTGAGES.

1. In the distribution of the proceeds of an insolvent estate, when the proceeds of the sale of the personal effects are insufficient to discharge the general privileges, and the proceeds of the sale of the real estate which is mortgaged are required to contribute, the proceeds of the mortgage which is least ancient must first be applied, and so on, in regular succession, or until the privileges are discharged. This rule applies, whether the property mortgaged is situated in one or several parishes of the State; that is, if the mortgage on one piece of property, in one parish, is less ancient than that of another parish, it must first be exhausted before that of the other parish, of a prior date of registry, can be called upon, and the mortgage of the latter parish, of prior date, can only be called upon to make up the deficiency.
Succession of Rousseau, 1.
2. The mortgage creditor whose registry has the priority of date, is entitled to be paid first out of the proceeds of the sale of the mortgage property. *Succession of Lydia Robinson*, 17.
3. In this case it was held that the recording of a sworn statement by the heir was not sufficient to give him a legal mortgage on real estate, which had been sold by the tutor to a third party, prior to the recording of his claim. *Boudreau v. Boudreau*, 57.
4. Though the personal obligation of universal legatee to pay a particular legacy is joint, their hypothecary obligation is solidary. *Doyal v. Doyal*, 97.
5. The legal mortgage in favor of particular legatees on the property of the succession, withheld by the universal legatees, must be recorded as against third persons, 22 An. 391, but it need not be recorded as against the universal legatees themselves. They are not "third persons," but "contracting parties," by *quasi contract*, resulting from their acceptance of a succession or universal legacy, subject to the payment of a particular legacy. C. C. (1825) 2314-15-16. *Ib.*

MORTGAGES—Continued.

6. This legal mortgage in favor of particular legatees is a right distinct from the *privilege* resulting from the separation of patrimony; and therefore the article 3242 of the Code of 1825, which requires the *privilege* to be recorded within three months from the opening of the succession, does not apply to this mortgage, which may exist without record as long as the obligation to which it is accessory. *Ib.*
7. Mortgages are *stricti juris*, and must, of themselves, be complete and give all the information which the law intends is necessary for third parties. Therefore, a judgment that has been rendered against a party who died before issue was joined, although recorded, does not operate on the property of his heir or legatee, who was not made a party to the suit, and a third purchaser of property from the legatee, after the rendition and recording of such judgment, is not affected by any mortgage resulting therefrom. *Norton v. Jamison*, 102.
8. For the purpose of determining whether a mortgage exists against the judgment debtor, resulting from the recording of a judgment, the judgment itself, as placed upon the record, can alone be consulted. The judgment creditor can not be permitted to introduce or consult the petition or pleadings in the case for the purpose of explaining or showing that the judgment is joint or *in solido*. Therefore, if the judgment, as recorded, shows that it is a joint judgment, and that more than one-half thereof has been paid by one of the joint judgment debtors, no judicial mortgage exists in favor of the judgment creditors, resulting from the recording of such judgment against the property of the joint judgment debtor who has thus paid. His part of the obligation being extinguished by payment, the judicial mortgage resting on his property falls with it. *Graves v. Hunter*, 132.
9. One mortgage takes rank over another by the priority of the date of registry in the office of the recorder of mortgages where the property mortgaged is situated. The priority of date of registry gives the preference over the property mortgaged or the proceeds thereof, if it has been sold without reference to the character of the debt on which the mortgage is founded. *Silliman v. Mills*, 206.
10. A mortgage that has not been reinscribed within ten years from the date of first inscription, loses its rank as a mortgage, and the subsequent mortgages on the same property that have not been perempted take rank from their respective dates of registry. 21 An. 204, 427; 22 An. 402. *Levy v. Mentz*, 261.
11. If a mortgage is not reinscribed within ten years, its rank becomes postponed to those mortgages which were placed of

MORTGAGES—Continued.

record subsequent thereto, but which were not perempted at the time of the reinscription. Therefore, if the property mortgaged be sold under the mortgage which has lost its rank for want of reinscription within ten years, it can only be sold subject to the mortgages having priority of rank. This priority of rank is to be determined by the date of registry, allowing to a mortgage which has perempted before reinscription to date only from the date of registry of the reinscription. *Byrne v. Citizens' Bank*, 275.

12. By a sale of succession property, mortgages existing thereon become transferred to the proceeds of the sale, and the purchaser of the property may have the mortgages erased from the records of the mortgage office by rule to that effect on the recorder of mortgages. A judgment recognizing the widow as legatee under the will, must conform to those provisions in the will which award the legacy. *Succession of Cordevielle*, 297.

13. If the act of mortgage has been partially destroyed by fire, by the destruction by fire of the office of the notary who was the custodian thereof, but the original document is sufficiently preserved so that its purport and extent is easily comprehended, words used by the notary in his certificate, explaining how certain defects occurred, will not so change its character from that of an authentic document to that of an act under private signature that the judge can not issue executory process thereon.

Marrero v. Barker, 302.

14. A prior mortgage creditor who holds a mortgage which contains the pact *de non alienando*, may pursue the property in the hands of a third holder without resorting to the dilatory proceeding by an hypothecary action. Therefore, if the junior mortgage creditor has caused the property to be sold, and it fails to bring an amount sufficient to pay the prior mortgage, then the prior mortgageor, whose mortgage contains the pact *de non alienando*, may proceed by executory process against the property mortgaged in the hands of the third possessor without resorting to the hypothecary action.

Bullier v. Huppenbauer, 339.

15. R. R. Barrow owned a tract of land near the town of Donaldsonville, in Louisiana, known as the Winter plantation. In 1862 he executed a mortgage on the entire tract in favor of Maginnis, with the pact *de non alienando* contained therein. In 1868 he sold thirty arpents of the tract lying contiguous to the town of Donaldsonville to one Pittman. Subsequent to this sale, Maginnis had caused his mortgage to be foreclosed, and had bought the entire tract at sheriff's sale. Pittman now brings suit for the thirty arpents which he had lately purchased from Barrow, which is contained in the Winter tract, against the possessor, who disclaims title in

MORTGAGES—Continued.

himself, but avers that he holds possession under a lease from Maginnis. Maginnis intervened, and asserted title to the entire tract under his purchase at sheriff's sale. The evidence shows that the thirty arpents sold by Barrow after he had executed the mortgage to Maginnis, with the pact *de non alienando* therein contained, was included in the tract known as the Winter plantation, which was covered by the mortgage. Held—That the sale by Barrow after the mortgage was given, with the pact *de non alienando*, of a portion of the land mortgaged, was a nullity, so far as as the mortgage was concerned; that the subsequent sale for the benefit of the mortgage creditor of the entire tract, without reference to the sale made of a part thereof by Barrow, conveyed the title to the purchaser to the whole tract; that the purchaser from Barrow after the mortgage had been given, acquired no title whatever as against the mortgage creditor to that portion of the tract conveyed by Barrow subsequent to the act of mortgage which contained the pact *de non alienando*. *Pittman v. Obercamp*, 342.

16. Prior to the adoption of the Constitution of 1868, the heirs of a deceased party had secured to them by law a tacit or legal mortgage on the property of the tutor or tutrix superior to all other mortgages of subsequent date. The executing of a bond for the faithful administration of the tutorship fixed the date at which the rights of mortgage attached to the property of the tutor in favor of the heirs, and a judgment of the court recognizing the mortgage rights in favor of the heirs, which omitted to fix the date at which the mortgage attached, did not thereby change or supersede the date as fixed by the bond. The recording of the tutor's bond, therefore, before the first of January, 1870, in pursuance to the provisions of the act of 1869, renewed and perpetuated the tacit mortgage which existed prior to the adoption of the Constitution of 1868, without reference to the judgment against the tutor on the bond. *Succession of Alexandre Labry*, 361.

17. The act of 1869, which provides a mode of registry for all mortgages which, before the adoption of the Constitution of 1868, were not required to be recorded, makes no distinction in the mode of recording those mortgages which existed at the time of the passage of the law, and those which came into existence after that period.

Ib.

18. A conventional mortgage which only has existence as a mortgage, from the date of registry, can only date and take rank from that period.

Ib.

19. A written statement, under oath, of the amount and character of the wife's claims against her husband for moneys received, etc., if recorded in the proper office within the time prescribed by law,

MORTGAGES—Continued.

is sufficient to preserve the wife's mortgage on the property of her husband as security for the restitution of her paraphernal estate which he has received. *Sauton v. Leverich*, 460.

20. The recording of the certificate of the notary who drew the act of mortgage, in the office of the recorder of mortgages of the parish where the property is situated, is not sufficient to give effect to the mortgage as against third persons. C. C. 3336; acts of 1855, No. 274, p. 335. *Succession of Simon*, 533.

21. A certified copy of the act of mortgage must itself be placed of record in the parish where the property is situated to give it effect. This rule does not apply to the parish of Orleans, the registry of mortgages in this parish being governed by special laws on the subject. Acts of 1855, No. 285. *Ib.*

22. A voluntary retrocession of property after the action to dissolve the sale has been prescribed, has no legal effect on a creditor of the vendee who has acquired a mortgage on the property subsequent to the sale. If, therefore, the vendee has retroceded the property after the action of retrocession is barred by prescription, the vendor takes back the property, subject to the mortgages which the vendee has placed upon it subsequent to the sale.

Nash v. Muggah, 539.

23. In this case the tutor was indebted to his wards, and his property was incumbered with a mortgage to that extent. To cause his other property to be relieved of this incumbrance, the tutor executed a special mortgage in their favor on a particular piece of property. This property thus specially mortgaged was subsequently sold by the tutor, and the vendee specially assumed the mortgage in favor of the minors. It was again sold by the vendee of the tutor, with a like assumption by the purchaser of the mortgage in favor of the minors. The heirs having become of age brought suit for the amount, and claimed a recognition of their tacit mortgage on the property of their tutor, now in the hands of a third possessor. The defense was prescription and the loss of the mortgage, on the ground of want of inscription. Held—That each one of the successive purchasers having specially assumed the mortgage standing on the property in favor of the minors, registry of the mortgage was not necessary as to them; that the substitution of the special mortgage by the tutor for the general mortgage only served to limit the operation of the general mortgage to the particular property described in the special mortgage, and to release all other property of the tutor from the effect of the general mortgage; that the giving of the special mortgage on a particular piece of property did not, therefore, destroy or impair the legal mortgage on that particular piece of property thus specially hy-

MORTGAGES—Continued.

pothecated, and that under the allegation by the heir that he had a legal mortgage on this particular piece of property, he was entitled to have it recognized and enforced in the hands of the third possessor. *McDaniel v. Guillory*, 544.

24. Two mortgage creditors seeking a preference over the proceeds of the sale of property mortgaged, can not, in a proceeding by third opposition, be permitted to attack the validity of each other's claims. In such a case it is not the right over the thing mortgaged that is to be passed upon, but the disposition of the proceeds of the sale of the thing mortgaged. In this form of action the respective rights to the proceeds must be determined by the priority of rank of the mortgage, without reference to the character of the claims. The true doctrine on this point seems to be that if one creditor wishes to destroy the right of another for the purpose of securing a preference for himself, he must do so by direct action and not by way of third opposition. *Frere v. Mentz*, 541.

25. If a mortgage has been recorded in the parish where the lands mortgaged are supposed to be situated, its validity will not be affected by the subsequent discovery, made in running the boundary line, that they are situated in the adjoining parish.

Stewart v. Walsh, 560.

26. The court having jurisdiction over the parish where the mortgage is registered, and the chain of title to the property is recorded, has jurisdiction to enforce the mortgage by granting an order of seizure and sale of the property. In such a case the mortgageor can not successfully urge in defense to the sale that the property mortgaged lies in another parish, more especially if it is shown that the mortgageor is a resident of the parish where the order has been granted. In the latter case, if it were shown that the property mortgaged is situated in another parish, then the order might be directed to the sheriff of that parish. *Ib.*

27. In this case it appears that a mortgage was given to secure a stock loan to the Citizens' Bank, dated in 1839; that in 1842 the bank foreclosed its mortgage and sold the property for an amount above the stock loan; that subsequently to the execution of the mortgage to the bank, and before the sale by the bank, the mortgageor became tutor to some minor heirs, and a tacit mortgage attached to his property for the faithful administration thereof. The purchaser of the property at sheriff sale soon thereafter executed another mortgage on the same piece of property in favor of the Citizens' Bank, to secure a stock loan in favor of himself. This latter mortgage the bank sought to foreclose. The heirs, who claimed a tacit mortgage on the property of prior date to the execution of this second mortgage to the bank, which tacit mortgage

MORTGAGES—Continued.

was duly recorded in 1869, intervened by way of third opposition, and claimed the proceeds of the sale of the property as first mortgage creditors. Held—That under this state of facts, the heirs having shown a prior mortgage of superior rank to that of the bank on the property seized, they were entitled to be paid by preference out of the proceeds of the sale.

Citizens' Bank v. Fluker, 567.

28. The fact that suit has been brought for a tract or body of land and afterward dismissed by the plaintiff, is not such a disturbance as will give the vendee the right to demand security against eviction before payment. If several persons have purchased a tract of land and given their obligation for the price *in solido*, with a single mortgage on the entire tract as security therefor, the vendor or the holder of the obligation may pursue either one of the obligors for the whole amount, but if he desires to sell the property mortgaged in payment of the obligation, then he must make all the obligors parties to the suit, otherwise no title of the interest in the land of such obligors as are not made parties would pass to the purchaser.

Hughes v. Patterson, 679.

NEW ORLEANS.

1. The charter of the city of New Orleans of 1856 accords no privilege in favor of the city or the contractor on the property of a front proprietor for making a banquette or pavement on the street. Section 110 of the charter, which gives a privilege in favor of the city for assessments of taxes on the property assessed, has reference only to assessments regularly made in conformity with law, and can not be extended by implication to other burdens authorized to be imposed on the property within the corporate limits of the city.
Succession of Rousseau, 1.
2. The notes issued by the city of New Orleans, known as city treasury notes, which on their face were made receivable for all debts and demands due the city, are not bills of credit within the meaning and intendment of section ten of article one of the Constitution of the United States.
Smith v. City of New Orleans, 5.
3. The act of the General Assembly of 1869, authorizing the funding of these notes in interest bearing bonds of the city, was a ratification by the State which legalized their issue by the city. Therefore, any holder of such notes is entitled to recover the amount from the city, with legal interest from judicial demand.
Ib.
4. Bonds issued by corporations and owned by the city of New Orleans, do not constitute a part of the franchises of the city, nor are they essential to the existence or proper exercise of the functions of the corporation. A judgment creditor of the city may

NEW ORLEANS—Continued.

therefore cause such bonds to be seized and sold in satisfaction of his debt.

City of New Orleans v. Home Mutual Insurance Company, 61.

5. A railroad company in the city of New Orleans, which has been authorized by the city to change the track of its railroad, can not be enjoined from so doing by an individual property holder situated on the line of the road, on the ground that such change would likely prove detrimental to the public health, and would therefore work an irreparable injury to him.

Hoyle v. New Orleans City Railroad Company, 535.

6. A party who discloses no interest whatever in an ordinance of the Common Council, can not be permitted to raise the question of its validity with another party who has acquired a right under the ordinance. *Ib.*

7. The city of New Orleans has absolute and plenary control of the disposition of the markets of the city. The purchaser of a stall from the farmer of a market is not bound in warranty to his vendee in case of eviction or disturbance by the city itself. An action in damages will not, therefore, lie against the vendor of a stall in the market in case the vendee has been disturbed by the city.

Barrere v. Bartet, 722.

8. Conceding that the act of 1818 conferred upon the city of New Orleans the monopoly of keeping powder magazines in the State of Louisiana, yet that act has been so modified by subsequent acts of the General Assembly as to confer the same authority on other corporations of the State; and is to that extent repealed, and the monopoly is thereby revoked. Therefore, since the passage of acts subsequent to the act of 1818, which confer on other corporations of the State the right to keep powder magazines, the city of New Orleans can not maintain an injunction against any person who may be keeping a powder magazine in any other part of the State, nor can the city maintain an action in damages against such person

New Orleans v. Hoyle, 740.

SEE CORPORATION

NOTARY PUBLIC.

1. A notary public is an officer of the State, who holds his appointment from the Governor by and with the consent of the Senate. The city of New Orleans has, therefore, no right or authority to impose a license tax on such officer in his official character.

City of New Orleans v. Bienvenu, 710.

2. The permission given to the city to impose a license tax on trades, occupations and professions does not include an authorization to impose a tax on a notary public or other State officer *Ib.*

OBLIGATIONS.

1. In this case a broker had entrusted to him the sale of a plantation in the parish of St. James. The purchaser, Curtis, was informed by the broker of the terms of the sale, which included the brokerage of two per cent. on the price to be paid by the purchaser. Curtis joined another party with him in the purchase, who knew nothing of the agreement to pay brokerage. Held—That this fact did not lessen his liability to the broker. *Miller v. Curtis*, 33.
2. A painter who undertook to have the work of painting a house done, purely as an act of friendship, without any charge on his part, and, when it is completed, furnishes the owner with a memorandum of the cost of materials furnished and labor employed by him, can not afterward, on the mere refusal of the owner to pay the bill, recover more than the amount so charged in the bill. In this case it was held that the refusal by the owner to pay the bill first made out by the painter, did not create an agreement or obligation to pay additional charges for his own services and supervision of the work which he had undertaken gratuitously. *Ayland v. Rice*, 75.
3. The obligations between employer and laborer on a plantation are reciprocal. If the employer discharge the laborer before the time of his engagement has expired, without any just cause, he at once incurs the liability of paying the laborer for the whole time of his engagement. On the contrary, if the laborer leaves his employer before the time of his engagement has expired, without any just cause, he thereby forfeits all the wages that may be due him, and contracts the obligation to return all moneys that he may have received from his employer on account of such employment. Therefore, if the evidence shows that the laborer left his employer without any just cause before the time of his engagement had expired, he can not recover from the employer any wages for the time he has served. *Bartell v. Lallande*, 317.

SEE BONDS.

SEE BILLS AND NOTES.

OFFICE AND OFFICERS.

1. Private citizens of a municipal corporation can not enjoin officers from the discharge of their duties, nor can they contest or inquire into their right to the offices by writ of *quo warranto*, even though they be taxpayers. *Voisin v. Leche*, 25.
2. In a proceeding by *quo warranto* to test the right to an office, no person not disclosing an interest in, or right to, the office, can be heard in the contest. 14 An. 506; Act of 1868, p. 197. *Ib.*
3. The act of 1864, creating the office of tax collector for the several parishes of the State, was repealed by the statute of 1868, entitled "An act to provide a revenue for the State government, and the

OFFICE AND OFFICERS—Continued.

manner of collecting the same." Therefore the office of tax collector, under the act of 1864, became extinct by the passage of the act of 1868, and such officer elected under that act must give way to the officer designated by the act of 1868 to collect the taxes.

State ex rel. Montieu v. Lavigne, 111.

4. In a proceeding under the intrusion act, No. 156 of 1868, to test the right to an office, the party claiming the office may be joined, and if it be ascertained that he is entitled thereto, he will be so recognized in the decree which pronounces the incumbent an intruder. *Ib.*
5. Article sixty-one of the Constitution commands the Governor to fill all vacancies that may occur during the recess of the Senate, by granting commissions, which shall expire at the end of the next regular session thereof. *State ex rel. George v. Tucker*, 139.
6. Article one hundred and twenty vests the General Assembly with power to determine the mode of filling vacancies in all offices for which provision is not made in the Constitution *Ib.*
7. By the act of the General Assembly of sixth of March, 1869, the parish of Tangipahoa was created, and the Governor directed to appoint the various officers named in the act. The commission granted to the Recorder stated that he should continue in office until the next general election for such office. At the next regular session of the Senate another party was appointed Recorder by the Governor, and confirmed by the Senate. The first appointee refused to surrender the office. Suit was brought under the intrusion act of 1868, No. 156, to test the right to the office under their respective commissions. The first appointee claimed that the office being created by the act under which he was appointed, no confirmation by the Senate was necessary, and that he was entitled to hold it until the time fixed by law for an election. Held—That the Legislature having in the act No. 27, of 1868, established a general system of appointment and confirmation, and the act under which the Recorder of Mortgages of the parish of Tangipahoa was first appointed, not being in conflict therewith, the court would presume that the latter act was passed with reference to the general law on the subject. Held, further—That in as much as the latter act was in no wise in conflict but was in harmony with the general law, the officer first appointed could only hold until the end of the next regular session of the Senate; therefore, the latter appointee, who was confirmed, is entitled to the office. *Ib.*
8. In a contest for office where each one of the contestants holds his commission from the Governor of the State, with no evidence before the court showing that a vacancy has occurred in the office,

OFFICE AND OFFICERS—Continued.

and no evidence *dehors* the commissions is offered which contradicts their recitals, the contestant who holds the commission first issued will be declared entitled to continue in the office.

State ex rel. Ard v. Barkston, 375.

9. In a contest for the right to an office under the intrusion act, No. 156 of 1868, the defendant has accorded to him the right to a trial by jury, if he asks for the same in the answer to the suit. If he file an exception to the action which is afterward adjudged to be an answer, he may still file an amended answer asking for a jury. But if the question of the character of the exception be not determined until the trial of the cause, and it then be held that it is an answer, the defendant is not thereby deprived of the right to a trial by jury which he has prayed for in the answer.

State of Louisiana ex rel. v. Gilmore, 606.

10. The Board of Assessors for the year 1867, who were removed from office before the one per cent. tax was levied by the General Assembly of 1868, have no right or claim to the per cent. allowed them as assessors, on the ground that their successors used the assessment rolls prepared by them in assessing the one per cent. tax of 1868. The suit against the Auditor to compel him to warrant on the treasury for such a demand was held to be vexatious.

State ex rel. Golding v. Graham, 780.

11. In a proceeding under the intrusion act to test the right of any person to an office, the State is a necessary party to the suit, and if it be shown that the incumbent is an intruder, he will be ejected without reference to the rights of the claimant to the office

State ex rel. Robinson v. Dranquet, 784.

12. The failure of a person who has been elected or appointed to an office to take the oath prescribed by the eligibility act of the twenty-sixth of August, 1868, within the time prescribed, does not *ipso facto* destitute him of the office. *Ib.*
13. The Legislature has no power to increase or diminish the term of office fixed by the Constitution, nor has the Legislature any power to fix conditions or impose penalties on a person holding an office which are not authorized by the Constitution. *Ib.*
14. The appointment of any person by the Governor to an office not vacant is absolutely null. *Ib.*
15. The act No. 120 of 1868, which confers the power on the police juries of the different parishes to appoint a district attorney *pro tempore* within thirty days, does not prohibit them from making the appointment after the thirty days have expired. An appointment of a district attorney *pro tempore* by the police jury after the expiration of thirty days is valid, provided the power of

OFFICE AND OFFICERS—Continued.

making such appointment, conferred upon the parish judge in the act, has not been exercised before it is made.

State ex rel. Rills v. Lynch, 786.

16. In case the police jury has made the appointment after the expiration of thirty days, but before the appointment by the parish judge, then the appointee has an indefeasible right to the office, and the person appointed afterward by the parish judge is an intruder into the office. *Ib.*

17. A district attorney who fails or refuses to bring a suit to test the right to an office under the intrusion act, may be compelled by mandamus to bring such suit. 21 An. 655. *Ib.*

18. If a suit to test the right to an office be tried in chambers, legal notice must be given to the parties interested. Revised Statutes, section 2605. A judgment rendered on default in a suit to test the right to an office, when the court is not in regular session, without giving the parties interested legal notice of the trial, is null and void. *State ex rel. Weber v. Billings*, 798.

PARISH COURT.

1. The parish court that has granted an order of sale of property belonging to a succession, has jurisdiction of a monition suit by a purchaser of the lands sold under its orders. The party opposing a monition is, for all legal purposes, the plaintiff in the action, and he must therefore establish his averments by proof.

Montgomery v. All the World, 239.

2. The parish court has exclusive original jurisdiction in the matter of receiving proof of last wills and testaments. Therefore, if the validity of a will be attacked on the ground of mental unsoundness of the testator at the time it purports to have been made, the parish court has exclusive jurisdiction to try the issue.

Succession of Labranche, 292.

3. A parish judge who grants an order of injunction from the district court, in the absence from the parish of the district judge, has no power or authority afterward to set aside such order on bond.

Woolley v. Russ, 580.

4. The parish court has jurisdiction to try criminal cases when the penalty is not necessarily imprisonment at hard labor or death, if the accused shall have waived trial by jury. Constitution, article 87. Being once vested with jurisdiction of a criminal cause, the parish court has the power to pass sentence and inflict such penalty as the law prescribes.

State v. Hiley, 600.

5. A suit by the heirs to set aside and annul orders or decrees rendered by the district court homologating their tutor's accounts, and to cause the tutor to render an account, is strictly a probate proceeding, and the parish court is vested with jurisdiction of such action without regard to the amount involved.

Nugent v. Randolph, 693.

PARTNERSHIP.

1. The defendants, R. L. Adams & Co., were sued for a balance due Josephus Love. R. T. Jennings, one of the firm of R. L. Adams & Co., averred that the indebtedness of Love, if it ever existed, was due by the former firm of R. L. Adams & Co., of which he was not a member, and not by the present firm, of which he is a member and against whom suit is brought. The evidence shows that at the time Jennings entered the firm of R. L. Adams & Co., he was made acquainted with the debt standing against the former firm in favor of Love; that he made no objection thereto, but, on the contrary, made provision for its liquidation by the new firm. Held—That these acts on his part amounted to an assumption of this liability as a partner. *Love v. Adams & Co.*, 66.
2. In this case two members of the firm of John Coleman & Co., bought out the interest of a third member, and assumed all the liabilities of the firm which had been dissolved. Dennis Cavanaugh was a creditor of the firm, for which he brought suit; Dennis Cronan, the retiring partner, was a creditor of Cavanaugh to an amount equal to the debt of the firm to Cavanaugh. By an agreement of parties the matter was left to arbitrators selected by them, who examined and adjusted the accounts, and awarded to Dennis Cronan the amount which the firm owed to Cavanaugh. This award of the arbitrators was shown on the trial of the case to have been agreed to by all parties. Held—That by this settlement confusion took place, and the debt of Cavanaugh against the firm was extinguished by the payment by the firm to Dennis Cronan, the same as if it had been paid to Cavanaugh and by him paid to Cronan; that the transaction was complete, and that Cavanaugh could not recover from the firm. *Cavanaugh v. Coleman*, 300.
3. Notes that have been given by the different partners in settlement of a partnership, which have fallen into third hands after maturity, can only be enforced against the makers thereof to the extent to which each member be found to be indebted to the partnership. In such a case the third holders, after maturity, acquired no greater rights to the notes in their possession than the partnership itself would have had, had they remained in the possession of its agent for final settlement. *Landry v. Landry*, 312.
4. In a suit by one partner for the settlement and liquidation of the partnership affairs of a commercial partnership, the partner claiming the settlement stands in no better position than that of any other creditor. It must therefore be shown affirmatively that he is a creditor, and that the other partner who is required to account is in default, before he can resort to the seizure of property, the title to which is not in the partnership, but which is alleged to be

PARTNERSHIP—Continued.

fraudulently in the possession of a third party under a simulated title. *McKee v. Griffin*, 417.

5. In the suit of one partner against another, to compel the liquidation and settlement of a commercial partnership, under the allegation that a third person (who, it is admitted, is not a partner and is in no manner interested in or connected with the partnership affairs), is the possessor of real estate, under a title translativ of property from the partner who is called to account, it was held that the writ of injunction could not be legally issued against such third possessor under such title, restraining him from using and enjoying his property, pending the suit for a settlement of the partnership, because, in the first place, it is not established that the partnership is indebted to the complaining partner, and therefore he has no right of action against such third possessor, and consequently is without the right to seek the conservatory writ of injunction. *Ib.*

6. It was held, further, that a third party, holding real estate in the State of Louisiana under a title translativ of property, could not be divested of his property, collaterally, by a suit for the settlement of an ordinary commercial partnership, of which it was not alleged that he was a member, or that he was in any way connected therewith, under the allegation that such third person had acquired his title to such real estate with a knowledge that it had been purchased by his vendor with partnership funds. *Ib.*

7. Planting partners are bound jointly, each for one-half of a debt contracted by them for the benefit of the partnership.

Dupre v. Boyd, 495.

8. In this case three parties, A, B and C, formed a commercial partnership, each placing in the firm to his individual credit, and to be under his individual control, an equal amount of the capital stock. By an article of the partnership it was acknowledged that three thousand dollars of the capital stock belonging to C was borrowed from D, for which the firm bound itself, on its dissolution, to pay. At or before the dissolution of the firm C drew out all his capital, including the amount which was owing to D. After the firm was dissolved, D brought suit for the three thousand dollars against each member of the firm on the promise and acknowledgment in the articles of partnership. Held—That D could not recover because the article of the partnership which acknowledge the indebtedness to D gave to C the exclusive control of his own capital in the partnership, which he had withdrawn before suit was brought. Held further—That under the allegations in the petition of D that she loaned the money to C individually, evidence to show the fact that C had withdrawn the same before suit was brought was admissible in a suit to hold the firm liable.

Dowd v. Elstner, Kinsworthy & Co., 656.

PARTNERSHIP—Continued.

9. In a suit for a settlement of partnership accounts, the question as to whether a certain fund is a partnership asset, belongs of right to the merits of the case, and should not be passed upon in an appeal from an order appointing a receiver.

Leathers v. Cannon, 781.

PAYMENT.

1. One who alleges extinguishment of his debt by payment, must prove it. *Gernon v. McCan*, 84.
2. Payment of a debt which is to be acquitted in money, may be made by a third person not interested, C. C. 2160; Dig. 46, 3, 53; but this payment must be the deliberate and intentional act of this third person, for payment is not merely the delivery of a sum of money, but the performance of an obligation—an act calling for the exercise of the will, of consent, without which it has not the characteristics of that mode of extinguishing obligations.

Ib.

3. When, therefore, it appears as matter of fact that a third person acted as agent, both for the makers of notes who desired an extension, and for a party who wished to purchase them as an investment, and consented to the extension, and this agent paid the money, believing that he was purchasing the notes, and the extension was accordingly made. Held—That the transaction would not be considered a payment, merely because the person who received the money imagined that he received it in payment.

Ib.

PETITORY ACTION.

1. A defendant who has allowed his lands to be seized and sold to pay his debts, can not afterward maintain a petitory action for the recovery of the lands against the purchaser at judicial sale. Being divested of title himself by the sale, he is estopped from setting up his title against the purchaser. *Tregre v. Baudry*, 18.
2. In a petitory action for a tract of land, if the plaintiff shows a title translativ of property, and the defendant shows none, the plaintiff will recover. In such a case, if the defendant and his warrantor are both appellees, no amendment of the judgment (as between them) can be made by the appellate court, but the rights of the defendant against his warrantor will be reserved in the decree awarding the land to the plaintiff. *Dupre v. Helm*, 145.

SEE ACTION.

SEE PLEADINGS.

PLEADINGS.

1. The husband who joins with and authorizes the wife to execute a mortgage on her paraphernal property for the purpose of improving it, can not afterward, when the mortgage is sought to be enforced,

PLEADINGS—Continued.

set up by way of defense that the property mortgaged was community property, and the wife was without the power or authority to encumber it. Having signed the mortgage himself, he can not be permitted to deny or gainsay his own solemn act.

Stewart v. Boyle, 83.

2. In a suit by executory process to foreclose a mortgage executed by the wife on her separate property, with the authorization of her husband, the authorization of the wife by the husband to defend the proceedings is not necessary. *Ib.*

3. In a suit of opposition to the administrator's account by the heirs, the names of the heirs must be set forth in the petition.

Succession of Hatcher, 136.

4. The authorization of the wife to appear in court as a party to the suit, must be shown otherwise than by her own averment or that of her attorney. 21 An. 576. Therefore, the appeal will be dismissed on motion, if the original petition of opposition to the administrator's account shows that the petitioners, who were married women, have been legally authorized to institute and prosecute neither the suit nor the appeal. *Ib.*

5. The capacity of a party who appears in court as the representative of another must be alleged, but it need not be proved unless specially denied. *Ib.*

6. Therefore, when the petition of opposition to the administrator's account only shows as to one of the opponents that he was a minor, without averring or designating his tutor or tutrix by name, it is defective, and under this averment the opponent can neither prosecute the suit nor the appeal. *Ib.*

7. It is not necessary that the answer, setting up the plea of payment, should specify the amount paid, and every circumstance of the time and place of payment. Therefore, evidence is admissible under the general allegation of payment to show the amount paid, and the time and circumstances of the payment.

Holmes v. Deplaigne, 238.

8. The effect of a judgment as between codefendants must be construed with reference to the pleadings and the nature of the obligation declared upon. Therefore, if the obligation sued upon be not solidary as to the drawers, yet if the acceptor is bound unconditionally for the whole debt, he can not maintain an injunction to restrain the sale of his property to pay the same, on the ground that his codebtors are not being pursued for their share, even though they be not bound *in solido*. *Barus v. Bidwell*, 296.

9. A party is estopped from contradicting in a subsequent action what he has judicially admitted or averred to be true in a previous action between the same parties. *Bender v. Belknap*, 764.

SEE PRACTICE.

SEE ACTION.

PLEDGE OR PAWN.

1. Jules Tuyes and Avegno & Willoz, brokers, purchased on joint account three hundred shares of the stock of the Commercial Waterworks Company for the aggregate sum of \$20,625. For the payment of this amount Avegno & Willoz paid \$625 in cash and Tuyes executed his notes for the balance, \$20,000, on time, and gave as collateral security the three hundred shares of stock. The stock, subsequently and before the notes were paid, depreciated in value. The notes, with the collaterals, were held respectively by the Bank of America, the Merchants' Mutual Insurance Company and the Mutual Insurance Company. The collaterals having depreciated in value, the holders called on the maker of the notes for a margin, which was for a part payment. The maker failed to pay and the shares of stock were sold according to law by the pledgees. At this sale the stock failed to bring the amount of the notes by a deficit of \$9029 80. Held—That, the maker of the notes having purchased the stock on joint account with Avegno & Willoz, brokers, and having paid the notes or become liable for their payment, they, the brokers, were liable to him for the one-half of the loss resulting from the sale of the stock by the pledgees, less the amount of the cash which they paid in at the time of the purchase. *Tuyes v. Avegno & Willoz*, 177
2. Prescription is interrupted on a note so long as the holder is in possession of collaterals pledged by the maker to secure its payment. *Blanc v. Hertzog*, 199.
3. An order or draft given on another, not negotiable in form, for the accommodation of a third party, without consideration, can not be enforced against the maker, even if it be in the hands of a pledgee. In such a case the pledgee would have no other or greater rights than the original payee himself would have. *Id.*
4. Stocks pledged to and in the possession of a bank as security for money loaned, constitute a standing acknowledgment of the debt, and prescription is interrupted during the time of the pledge. 21 An. 128; 22 An. 107. *Citizens' Bank v. St. Amans*, 293.
5. Horses, mules, and other work animals, together with farming implements used on a plantation in making the crop and belonging to the lessee stand as a pledge to the lessor for the payment of the rent. The pledge thus given and accorded to the lessor on the team, implements, etc., used in making the crop need not be recorded to give it effect. A different rule, however, governs with regard to the privilege on the crop for advances made, and supplies furnished to make it. In the latter case, if the lessor make advances and desires to preserve his privilege on the crop and other property on the place, he must have the lease recorded, as required by law. *Johnson v. Tacneau*, 453.

PLEDGE OR PAWN—Continued.

6. In a contract of pledge the pledgee has the right to dispose of the thing pledged in payment of his obligation at maturity, whether the thing pledged belongs to the debtor or to a third party, who gave it as surety for the debtor. The contract of pledge is different from that of surety. In the former case a material thing is given in pledge as security for the debt, while in the latter case a person is given as security that the debt will be paid, and in the latter case if the creditor give to the principal debtor an extension of time without giving notice to the surety, the surety thereby becomes discharged, which is not the case where a thing has been given as a pledge that the debt should be paid.

James v. Pike, 477.

7. Movable property belonging to the lessee, and placed by him on the leased premises, is pledged to the landlord for the payment of the rent. C. C. 2675. Such property may be seized by the landlord while on the premises or within fifteen days thereafter, provided the lessee continues to be the owner. But if the lessee ceases to be the owner, then and in that case it can not be seized for the rent after it has been removed from the premises.

St. Charles Hotel Company v. Tarbox, 715.

POLICE JURIES.

1. Notes given by the police jury without an ordinance of that body authorizing their issue, impose no legal obligation on the parish to redeem them. *Capmartin v. Police Jury, 190.*
2. An ordinance of the police jury passed subsequent to the issuing of notes, authorizing their issue, will not render valid those notes which were issued without the authority of the ordinance and before it was passed. *Ib.*
3. Under the act of 1853, the police juries are prohibited from contracting a debt against the parish they represent without providing in the same ordinance for the payment of the principal of the debt so contracted. Therefore, the notes authorized to be issued by ordinance of the police jury can not be enforced against the parish if the ordinance that authorizes their issue does not provide the means for paying the principal and interest on such notes. *Ib.*
4. If express power is given by law to the police juries to raise money by taxation for building roads and bridges, no other mode of raising the money for that purpose can be exercised by them. Therefore, bonds issued by the police jury for the purpose of raising funds to build a bridge or road are not binding on the parish, because the jury is not authorized by law to issue bonds for such purpose.

Marionneaux v. Police Jury, 251.

RIGHT OF WAY—Continued.

on the line or route of the road, and is required for the uses and location thereof, a scrupulous regard to the ascertainment of a just and full valuation of the property to be taken from the owner, and the compensation to be given him must be observed. If, therefore, as in the present case, one set of commissioners have made a report of the value of the property which was set aside by the judge *a quo* at the request of the company, and another has been appointed who, after taking further testimony, have made a second report, reducing the value of the property to be taken below one-half that placed upon it by the first set of commissioners, which latter estimate is approved by the judge *a quo*, the Supreme Court will, on appeal, in the exercise of their discretionary powers in such cases, remand the cause to the court of the first instance, with instructions that a new commission be appointed, and the case be in other respects proceeded with according to law.

New Orleans, Mobile and Chattanooga Railroad Company v. Zeringue, 521.

RES JUDICATA.

1. Where a sale has been made by order of the probate court of the property of a succession for the purpose of affecting a partition among the heirs, and the administrator files his account of the partition, which is duly homologated by the judge, a subsequent suit for partition will not be entertained, because the title to the property constituting the succession passes by the sale to the purchasers, and can not afterward be returned to the succession to be again administered upon. The judgment of the court homologating the administrator's account of partition is *res judicata*.

Womack v. Womack, 351.

SEE JUDGMENT

RESOLUTORY CONDITION.

1. The vendor of a tract of land may enforce the resolatory condition against a third purchaser from his vendee. If, therefore, it appears as a matter of fact that the wife has taken a tract of land as a *datien en paiement* of her judgment against her husband, which is subject to the resolatory condition because the price has not been paid, then and in such case she can not successfully resist the payment of notes and mortgage which she has placed upon it, on the grounds that the notes and mortgage were given under marital influence and to secure a debt of her husband.

LeBourgeois v. LeBourgeois, 757

SEE PETITORY ACTION.

SALE.

1. In a deed to a tract of land appeared the following clause: "The said purchaser reserving to himself the right, after having effected the payment of the first sixth part, to postpone the payment of the last five-sixths from year to year, indefinitely, in consideration of an annual interest of ten per cent. from the maturity of the respective sums or terms, whose payment shall be thus postponed, which interest shall be exigible from year to year. In default of payment promptly, the whole capital to be exigible, as if there had been no stipulation for that delay." Held—That the stipulations in the act or deed, postponing payments on the five-sixths indefinitely, on condition that ten per cent. interest was paid annually and the other conditions did not change the character of the act from that of a sale to that of a contract of rent, and, therefore, the vendor could not maintain an action for rent on the deed, in case the conditions were not promptly complied with.

Heirs of Bourgeois v. Thibodaux, 19.

2. In the sale of a house and lot, the vendee took a special mortgage on a tract of land belonging to the vendor, to secure himself against a mortgage of a third party standing against the house and lot. The vendee was subsequently compelled to pay the mortgage against the house and lot. He afterward brought suit against the vendor on the special mortgage to reimburse himself for the outstanding mortgage on the house and lot which he had been compelled to pay. On trial of this suit it was shown that the whole transaction was based on an illicit paper currency commonly called Confederate money. Held—That the contract having no legal foundation to rest upon, could not be enforced by the courts.

Bloom v. Dixon, 265.

3. If the possession of the defendant to real estate is of date anterior to the title under which the plaintiff claims, then and in that case the plaintiff can not recover unless he show a perfect title. 15 An. 454.

Patterson v. Litton, 274.

4. Prior to the act of 1847, the parish judge or his clerk could alone make a valid sale of succession property. C. C. 2600. Therefore a sale made of succession property prior to that date, by an auctioneer, conveyed no title whatever. *Ib.*

5. Defendant owed plaintiff \$8008. To secure this debt he sold to plaintiff three-fourths of his plantation, and gave his three notes, each for one-third of the debt, due at one, two and three years, with a stipulation in the agreement that if the debtor should promptly pay the notes at their maturity, the land was to revert to him again; but if he failed to pay the notes at maturity, then the right to recover back the plantation or the portion he had thus disposed of was forfeited. Held—That this transaction was a sale

SALE—Continued.

- with the right of redemption, and not a mortgage given by the debtor to secure the debt. *Carter v. Williams*, 281.
6. Where five parties own a tract of land in common, and all agree to sell and do sell and transfer it to one person, and the vendee gives his notes to each one for their respective shares of the land, and all the vendors join in the sale in one act, in which act of sale it is expressly stipulated that a mortgage is retained on the whole property as security for the payment of each one of the notes, and the vendee makes retrocession of four of the five shares of the tract of land to four of the vendors, then, and in that case, the third holder, before maturity, of the notes given to the fifth vendor for one-fifth interest in the land may enforce his mortgage rights against the whole tract of land first conveyed without reference to the retrocession. *Stewart v. Buard*, 411.
7. If it be stipulated in a contract that in case the obligation is discharged in United States treasury notes, it shall be in the proportion of one dollar and thirty cents in currency for every dollar expressed on the face of the obligation, the proper decree and judgment is to reserve to the maker of the notes the option to discharge the obligations in gold. A decree that the defendant be ordered to pay in currency with thirty per cent. additional is incorrect, because at the time of payment the price of gold might be less than thirty per cent. premium. *Ib.*
8. A promise to sell a lot of cotton is void as against an innocent third purchaser, to whom it was subsequently sold and delivered, if the price had not been paid and the cotton delivered before the second sale and delivery. *Meagher v. Reading*, 436.
9. In the sale of tobacco or other merchandise the *lex loci contractus* governs; therefore a contract of sale of a lot of tobacco in New York to a merchant residing in New Orleans, will be construed with reference to the laws and customs of that place which govern and regulate such transactions. *Harris v. Nasits*, 457.
10. It being shown to be the custom in New York among tobacco merchants, to close a transaction of the sale of a lot of tobacco at once and without reclamation, and it being shown in this case that that custom was observed, and that the purchaser examined the tobacco itself before purchasing, and having given his written acceptance in payment thereof, he could not be allowed thereafter to resist the payment of the draft given on the ground that the tobacco was unsound and worthless. *Ib.*
11. In a suit to recover the difference between the price agreed upon for the sale of a lot of cotton and the price which it actually brought (the first sale having failed of completion), the vendor must show that he complied with every requisite and condition on

SALE—Continued.

his part, and that the cause of the failure to complete the first sale was attributable entirely to the vendee, failing in which he can not recover the difference from the first vendee.

Moss v. Howard, 465.

12. An act of sale of real property under private signature takes effect against third persons only from the date of registry in the proper office and the delivery of the property. If, therefore, real estate has been sold under act by private signature, and the vendor remains in possession, and the act is not recorded, a third purchaser by public act acquires a good and valid title thereto, notwithstanding the former sale under private signature.

Morgan v. Kinnard, 645.

13. A judicial admission or allegation in the defense to the payment of notes given for the price of land that the defendant has no title, will not enable a third person, who gets possession of such land without title, to hold it under such judicial admission. The general rule is, however, well established that judicial confessions, when voluntarily made, are conclusive against the parties making them. *Ib.*

14. The price, the thing and the consent are essential elements of the *vente a remere* as well as of an unconditional sale.

Calderwood v. Calderwood, 657.

15. The right of redemption constitutes a resolutory and not a suspensive condition, and the purchaser, therefore, becomes at once proprietor, and can exercise all the rights of property, including the right of disposition. *Ib.*

16. The consent, which is the essence of the contract of sale, consists in the concurrence of the vendor's volition to sell a particular thing for a particular price, and of the vendee to purchase the same for the same price. When, therefore, J. C. made a contract with W. C. in the form of a sale of lands, but by a counter letter of even date it appeared (1) that the real intent of the parties was to secure the payment of a debt which remained unextinguished; (2), that the amount of the nominal price over and above this debt was not serious; (3), that the vendee, so-called, was not invested with the right of disposition; and (4), that there was really no consent of J. C. to sell or of W. C. to buy. Held—That the effect of the two instruments together was to constitute an antichresis, and not a *vente a remere*.

17. In the absence of the stipulation respecting interest permitted by R. C. C. 3180, the disposition of the revenues of the pledged immovable is governed by article 3176. Parol evidence is inadmissible against or beyond what is contained in the acts, and in regard to what may have been said before, at the time of, or after

PRACTICE—Continued.

adultery against the plaintiff, her husband. Held—That the plaintiff's petition must be dismissed, and that the prayer of the wife in reconvention must be granted, that a judgment of divorce *a vinculo matrimonii* must be granted in her favor and against the husband. *Depass v. Winter*, 422.

28. A defendant who admits that he owes a debt which he has failed to pay, can not be relieved from the payment of the costs which the plaintiff has incurred in prosecuting his demand. In such a case, where no other defense is urged but that of the liability for costs, the appellant will be condemned to pay damages for frivolous appeal. *Bayly v. McKnight*, 423.

29. The defendant can not be permitted to question the validity of the claim on which a judgment has been rendered in a suit to revive it, the object of revival being only to interrupt the current of prescription. Revised Statutes of 1870, section 2313.

Carondelet Canal Navigation Company v. De St. Romes, 437.

30. The defendant having admitted in the answer, that the indorser was the owner of the note, can not in a suit by the holder, urge the defense that the signature of the indorser is not proved, and that the holder can not therefore recover. *Cady v. Gaines*, 448.

31. In case the appellant has failed to cause a note of the evidence, on trial in the court below, to be affixed to the record, the Supreme Court will presume that the judge *a quo*, in rendering his judgment, proceeded to do so on proper and sufficient evidence.

Simmons v. Howard, Prestons & Barrett, 504.

32. In a proceeding to cause a judgment of another State of the Union to be made executory in this State, it is sufficient under the general issue for the plaintiff to show that the judgment which is sought to be rendered executory has been duly rendered, and that the record thereof has been properly authenticated. *Ib.*

33. It is not necessary for the plaintiff, in answer to the plea of domicile, to show that the defendant has changed his domicile from one parish to another. It is sufficient if he shows that the defendant has a domicile in the parish where suit is brought. If the defendant, by his own acts, has rendered the place of his real domicile equivocal and uncertain, the creditor may, on showing the fact, proceed against him in either parish, at his option.

Villere v. Butman, 515.

34. The authorization of the wife by the husband to institute and prosecute a suit in the court below, includes the authority to take an appeal from the judgment rendered against the wife. An action to annul a judgment can not be maintained if all the parties to the suit in which it was rendered are not made parties to the suit to annul. *Bell v. Silbernagle*, 569.

PRACTICE—Continued.

35. The issuing of an execution against the administrator in his individual capacity, on his failure to pay the judgment creditors of the succession out of the funds of the estate adjudged to be in his hands, is a sufficient compliance with the requirements of articles 1055, 1056 and 1057 of the Code of Practice to authorize proceedings by the creditor against the surety on the administrator's bond. In such a suit the surety on the bond can not plead the defense that the debt on which the judgment against the succession is based was prescribed at the time of its rendition.

Christian v. Lassiter, 573.

36. A suit brought on an obligation that is not due, is premature, and should be dismissed, leaving the party to his remedy when the obligation matures. C. P. 158. A sequestration may, however, issue where a privilege exists, notwithstanding the principal obligation is not yet due. C. P. 275.

Catlett v. Heffner, 577.

37. Any party interested in a judgment may have the same revived by causing the judgment debtor to be cited before the court which rendered the judgment, before prescription has accrued. The restraining of the execution of a judgment by a writ of injunction sued out by the judgment debtor does not interrupt the current of prescription. If, therefore, more than ten years are allowed to elapse from the date of the rendition of the judgment without causing the judgment debtor to be cited, the judgment is prescribed.

Yale v. Randle, 579.

38. The inferior court is bound to confine its examination of a cause that has been remanded to the questions that have not been finally passed upon by the appellate court. A due bill for money can not be compensated by a conditional obligation or liability of a surety on an administrator's bond.

Succession of Arick, 611.

39. If the suit be commenced before the entire obligations sued upon are due, but such obligations become due before judgment, the court may, in its discretion, allow an amendment of the pleadings so as to cover the whole demand.

Warfield v. Oliver, 612.

40. A third person who claims by way of third opposition the proceeds of the sale of property is not required to make oath to the facts upon which he bases his demand in order to arrest the proceeds in the hands of the sheriff pending the inquiry. Either the party to the suit or his attorney may make oath to the absence of the district judge from the parish.

Rains v. Chaffe, 657.

41. A judgment creditor who has caused a seizure of real estate, the ownership and possession of which is shown to be in a third party, can not be permitted to attack his title thereto in an injunction taken out by the owner to stay the sale, unless he allege that the title is simulated. The allegation of fraud, if made, would not authorize the attack of the title in this form of action.

Markham v. O'Conner, 688.

PRACTICE—Continued.

42. If a creditor has intervened and made himself a party to the suit of the wife against her husband, he can not afterward, and in another form of action, attack the judgment rendered in favor of the wife. *Ib.*
43. An action to enforce the payment of a debt can not be defeated by a peremptory exception, that the action should be one for the settlement of a partnership, unless it be shown affirmatively that a partnership exists. *Wallace v. Marion, 738.*
44. A defense in reconvention founded on an agreement that the defendant was to have five per cent. on the amount of the net profits of the establishment as a salary as clerk in the store can not be enforced until the debts due it are collected. *Ib.*
45. A defendant is essentially a plaintiff when he makes a reconventional demand. The burden of proving the demand in reconvention, therefore, falls exclusively on the defendant. *Graham v. Hemard, 769.*
46. A defendant who appears for the purpose of excepting to the jurisdiction of the court, and at the same time enters the plea of *lis pendens*, can not be heard to urge the plea of want of citation. 21 An. 438. The court having jurisdiction of the property taxed has jurisdiction to enforce the collection of the taxes. The plea of *lis pendens* will not be sustained when the thing demanded in the two cases is not the same.

City of New Orleans v. Walker, 800.

SEE PLEADINGS.

PRESCRIPTION.

1. The action to recover the wages of a person employed as a nurse is prescribed by one year. C. C. 3534. *Vaughn v. Terrell, 62.*
2. If more than five years have elapsed between the date of credits placed on a note, the latter credit must be shown to be in the handwriting of the debtor in order that it may be urged as an interruption of prescription. Evidence that it is in the handwriting of the creditor with the knowledge of the debtor, will not suffice to interrupt prescription. 21 An. 748. *Areaux v. Mayeux, 172.*
3. A judgment becomes final from the date of the signature of the judge *a quo*, and if ten years are allowed to elapse from the date of such signature before citation of revival is served on the defendant, it is prescribed. The delay caused by a suspensive appeal will not be counted in favor of the judgment creditor to defeat the plea of prescription. *Walker v. Hays, 176.*
4. If prescription has been acquired in favor of an estate, parol evidence will not be admitted to show an interruption, nor will the written acknowledgment by the executor, made after prescription has been acquired, be allowed to establish an interruption.

PRESCRIPTION—Continued.

21 An. 373. When, therefore, a judgment has been rendered against a party in his individual capacity and as executor of his co-debtor, and the proof shows that the written acknowledgment by the executor of the obligation of his co-debtor was not made until after prescription was acquired, then, and in that case, the injunction against the seizure on the judgment thus rendered will be perpetuated in so far as the estate is concerned, on the ground and for the reason that the debt was prescribed as against the succession.

Flanner v. Lecompte, 193.

5. Prescription is interrupted on a note so long as the holder is in possession of collaterals pledged by the maker to secure its payment.

Blanc v. Hertzog, 199.

6. A mortgage is not prescribed so long as the primary obligation is in force, notwithstanding it has not been reinscribed within ten years.

Berry v. Marshall, 244.

7. A proposition of the executor to pay a note against the succession he represents before it is prescribed, if the holder will throw off the interest, is sufficient to interrupt the current of prescription.

Walker v. Cruikshank, 252.

8. The prescription of one, three and five years does not apply to actions against a sheriff and his sureties on his official bond, for misfeasance or malfeasance in office; such action is prescribed by two years, beginning from the date of default. Revised Statutes of 1870, p. 683.

Kohler v. Walden, 299.

9. A promise to pay notes, after prescription has accrued thereon, which are secured by mortgage, creates a new debt, evidenced by the notes, but it does not revive the mortgage which has perempted by the prescription of the notes. Therefore, if notes which are secured by a mortgage have prescribed, and the debtor has afterward acknowledged them, they become an ordinary debt only.

Succession of Kugler, 455.

10. A suit to recover from the sheriff money made by him in a judicial proceeding, is not an action against the sheriff for misfeasance or nonfeasance in office, and is not, therefore, prescribed by two years.

Spalding v. Walden, 474.

11. Prescription runs against all persons except such as are included in some exception established by law. C. C. 3540. The State does not fall within any of the express exceptions to the current of prescription.

Graham, Auditor, v. Tignor, 570.

12. Promissory notes given in favor of the Auditor of Public Accounts for the sale of school lands belonging to the State, are therefore prescribed by five years, the same as if they belonged to an individual.

Ib.

13. A renunciation of prescription after it has been acquired must be

PRESCRIPTION—Continued.

express. A written proposition by the maker of the note, after prescription has been acquired, to take out a life insurance policy in favor of the holder, is not such an acknowledgment of the debt as the law requires to establish a renunciation of an acquired prescription. *Ross v. Adams*, 621.

14. Prescription does not run against the tutor on a claim which he has against his ward for board and lodging during the tutorship, nor are such items prescribed until the lapse of four years after the tutorship has terminated, that being the period of time allowed by law to the minor after emancipation within which the tutor may be called upon for an account. In like manner, the charges of the minor for services rendered the tutor during the time of the tutorship, are not prescribed until four years have elapsed after the tutorship has terminated.

Tutorship of Isabella P. Hecitt, 682.

15. An unconditional offer to pay a debt is such an acknowledgment as will interrupt the current of prescription. Such offer or acknowledgment may be proved by parol evidence.

Wansley v. Willis, 703.

16. The prescription of five years applies as well to promissory notes given in favor of the State as to those in favor of private parties. See *Graham, Auditor, v. G. W. & J. T. Tignor et al.*, ante page 570.

State v. Heirs of White, 733.

SEE PLEADINGS

PRIVILEGE.

1. The charter of the city of New Orleans of 1856 accords no privilege in favor of the city or the contractor on the property of a front proprietor for making a banquette or pavement on the street. Section 110 of the charter, which gives a privilege in favor of the city for assessments of taxes on the property assessed, has reference only to assessments regularly made in conformity with law, and can not be extended by implication to other burdens authorized to be imposed on the property within the corporate limits of the city.

Succession of Rousseau, 1

2. The privileges existing on the stock of goods for the salaries of clerks, which have been ascertained and recognized by third opposition, will be first paid out of the proceeds of the sale of the property by the sheriff, unless as in this case the partner in *com-mendam* expressly assumed to pay them.

Austin, Thorpe & Co. v. Da Rocha, Becker & Co., 44.

3. These privileges of clerks for salaries on the goods in the store are not lost or impaired by a simulated sale and transfer of the store to other parties; nor does the taking of a note by a clerk for his salary novate the debt nor destroy the privilege. *Ib.*

PRIVILEGE—Continued.

4. The legal mortgage in favor of particular legatees on the property of the succession, withheld by the universal legatees, must be recorded as against third persons, 22 An. 391, but it need not be recorded as against the universal legatees themselves. They are not "third persons," but "contracting parties," by *quasi* contract, resulting from their acceptance of a succession or universal legacy, subject to the payment of a particular legacy. C. C. (1825) 2314-15-16. *Doyal v. Doyal*, 97.
5. This legal mortgage in favor of particular legatees is a right distinct from the *privilege* resulting from the separation of patrimony; and therefore the article 3242 of the Code of 1825, which requires the *privilege* to be recorded within three months from the opening of the succession, does not apply to this mortgage, which may exist without record as long as the obligation to which it is accessory. *Ib.*
6. Buildings or other improvements, placed upon and attached to the land by a third party, belong to the owner of the soil, C. C. 499; and when constructions have been made by a third person on the lands of another, with his own materials, the owner of the soil has the right to keep them on reimbursement of the value of materials and price of workmanship. C. C. 500. Therefore the sale by the sheriff, under execution, of a house built by a third person on the land of another, at the expense of the owner of the soil, is null and void, and the owner of the soil has the right by injunction to prohibit the purchaser at sheriff's sale from removing the house. In such a case, the owner of the house is entitled to damages for the illegal seizure and sale of his property. *Poche v. Theriot*, 137.
7. Privileges in favor of the furnisher of supplies to a plantation spring only from the law that confers them. They can not be the subject of contract. An acknowledgment of the administrator that the creditor has a privilege on the crop made by the estate which he is administering can not, therefore, be recognized as conferring a lien on the cotton made on the place, unless it be shown that he, the creditor, has furnished the supplies to make it.

Payne v. Spiller, 248.

All privileges in favor of merchants for supplies furnished to a planter, to have effect against third persons, must be recorded in the book of mortgages and privileges in the mortgage office of the parish where the property to be affected is situated. Constitution, article 123.

White v. Bird, 270.

9. A privilege given by private contract confers no preference over a mortgage on the same property, if it is not recorded in the parish where the property is situated on the same day on which the act or other evidence of the debt was made. C. C. 1870, 3274.

Foley v. Hagan, 286.

PRIVILEGE—Continued.

10. A contractor who repairs or reconstructs a building, whereby the land or lot of ground on which it stands is enhanced in value, has the same lien and privilege on the building which the law accords to a contractor on a new building. Where, therefore, the vendor seeks to enforce his lien on the lot of ground for an unpaid portion of the price, the contractor who has made repairs on and reconstructed the buildings thereon since the sale, may cause a separate appraisement of the buildings from that of the land to be made, and enforce his lien on the buildings, which is superior to that of the vendor's lien on that part of the valuation which is estimated to be in the buildings. *City of Baltimore v. Parlange*, 365.
11. The act of the General Assembly of 1841, amending article 3214 of the Civil Code, and giving to the consignee, commission agent and factor a privilege and preference over the attaching creditor on the goods consigned, is not repealed or modified by the act of March 28, 1867, amending article 3184 of the Civil Code, in reference to privileges on certain movables.
Buddecke v. Spence, 367.
12. The fact that the consignor gives the consignee notice in writing at the time the goods are shipped that he intends to draw on him, does not impair, destroy or postpone the privilege given by law on the goods shipped for any balance that may be previously due him. In this respect it makes no difference whether the indebtedness results from advances made on the goods shipped or not.
Ib.
13. Dry goods, such as calico, lawn, poplin, white cotton hose, and the like, sold to laborers on a plantation, give no privilege to the vendor on the crop of cotton of that year grown on the place. A privilege is only given on the growing crop of the year for such necessary supplies as are used in producing it.
Wallace v. Urquhart, 469.
14. The vendor's privilege is not required to be recorded as between the parties to the act. If, therefore, in a suit to enforce the lien there are no third parties who are affected, the fact of non-registry will not avail the defendant. *Thompson v. Comeau*, 555.
15. A privilege on the growing crop of cotton raised on a plantation in favor of a furnisher of supplies, which commenced after the first of January, 1870, is without effect against third persons, if it has not been recorded. The debtor for supplies being a lessee, the owner of the plantation and the stock thereon is a third person within the meaning of article 123 of the Constitution. If, therefore, the owner of the plantation, a third person, was in the possession of the cotton at the time the privilege was asserted by the furnisher of supplies, then and in such case the furnisher could

PRIVILEGE—Continued.

not hold the same, because not having had his privilege recorded, and the cotton having passed into third hands the privilege was lost.

Beard v. Chappell, 694.

16. Under the allegation of ownership in a suit for a lot of cotton, if the plaintiff fails to establish title, he can not in the same action be permitted to show that he has a lien and privilege on the same cotton to secure the payment of the debt which has not been judicially demanded. A *datien en paiement* is incomplete if the thing given in payment has not been delivered. C. C. 2655, 2650.

Silbernagel v. Baker, 699.

17. Furniture lodged in a building by the lessee is pledged to the landlord for the payment of the rent. A seizure of it by the landlord, and a release of the seizure by the lessee's giving bond, does not destroy or impair the privilege accorded by law in favor of the landlord. A seizure or sequestration by a creditor after the property has been released on bond, will not, therefore, interrupt or affect the privilege already existing for the payment of the rent.

Harrison v. Jenks, 707.

PROHIBITION.

1. On application for a writ of prohibition against the judge *a quo*, the Supreme Court will review the evidence taken in the court below touching the solvency and sufficiency of the surety on the appeal bond, and if the surety is found to be sufficient and the case is in other respects appealable, the prohibition will issue.

State ex rel. Shropshire v. Judge of the Fifth District Court, 491.

PUTTING IN DEFAULT.

1. A purchaser of property at judicial sale acquires an indefeasible title by complying with his bid. In case of an active violation of the contract of purchase by the purchaser, or in case of open refusal to comply with his bid after demand, default is not necessary as a condition precedent to the action for the rescission of the sale and the recovery of damages. But if no demand has been made on the purchaser to comply with the terms of the sale, then and in that case a putting in default would seem to be a condition precedent to recovery.

Heirs of Doll v. Kathman, 486.

2. As a condition precedent to the action for the rescission of contracts and the recovery of damages for the nonperformance of engagements, the putting of the party in *mora* is strictly required, and the default must be made certain.

Ib.

RIGHT OF WAY.

1. In case of a railroad company that has obtained a right of way through the domain of a State, and the authority is given the company to force the alienation of such private property as may lie

RIGHT OF WAY—Continued.

on the line or route of the road, and is required for the uses and location thereof, a scrupulous regard to the ascertainment of a just and full valuation of the property to be taken from the owner, and the compensation to be given him must be observed. If, therefore, as in the present case, one set of commissioners have made a report of the value of the property which was set aside by the judge *a quo* at the request of the company, and another has been appointed who, after taking further testimony, have made a second report, reducing the value of the property to be taken below one-half that placed upon it by the first set of commissioners, which latter estimate is approved by the judge *a quo*, the Supreme Court will, on appeal, in the exercise of their discretionary powers in such cases, remand the cause to the court of the first instance, with instructions that a new commission be appointed, and the case be in other respects proceeded with according to law.

New Orleans, Mobile and Chattanooga Railroad Company v. Zeringue, 521.

RES JUDICATA.

1. Where a sale has been made by order of the probate court of the property of a succession for the purpose of affecting a partition among the heirs, and the administrator files his account of the partition, which is duly homologated by the judge, a subsequent suit for partition will not be entertained, because the title to the property constituting the succession passes by the sale to the purchasers, and can not afterward be returned to the succession to be again administered upon. The judgment of the court homologating the administrator's account of partition is *res judicata*.

Womack v. Womack, 351.

SEE JUDGMENT

RESOLUTORY CONDITION.

1. The vendor of a tract of land may enforce the resolutive condition against a third purchaser from his vendee. If, therefore, it appears as a matter of fact that the wife has taken a tract of land as a *datien en paiement* of her judgment against her husband, which is subject to the resolutive condition because the price has not been paid, then and in such case she can not successfully resist the payment of notes and mortgage which she has placed upon it, on the grounds that the notes and mortgage were given under marital influence and to secure a debt of her husband.

LeBourgeois v. LeBourgeois, 757.

SEE PETITORY ACTION.

SALE.

1. In a deed to a tract of land appeared the following clause: "The said purchaser reserving to himself the right, after having effected the payment of the first sixth part, to postpone the payment of the last five-sixths from year to year, indefinitely, in consideration of an annual interest of ten per cent. from the maturity of the respective sums or terms, whose payment shall be thus postponed, which interest shall be exigible from year to year. In default of payment promptly, the whole capital to be exigible, as if there had been no stipulation for that delay." Held—That the stipulations in the act or deed, postponing payments on the five-sixths indefinitely, on condition that ten per cent. interest was paid annually and the other conditions did not change the character of the act from that of a sale to that of a contract of rent, and, therefore, the vendor could not maintain an action for rent on the deed, in case the conditions were not promptly complied with.

Heirs of Bourgeois v. Thibodaux, 19.

2. In the sale of a house and lot, the vendee took a special mortgage on a tract of land belonging to the vendor, to secure himself against a mortgage of a third party standing against the house and lot. The vendee was subsequently compelled to pay the mortgage against the house and lot. He afterward brought suit against the vendor on the special mortgage to reimburse himself for the outstanding mortgage on the house and lot which he had been compelled to pay. On trial of this suit it was shown that the whole transaction was based on an illicit paper currency commonly called Confederate money. Held—That the contract having no legal foundation to rest upon, could not be enforced by the courts.

Bloom v. Dixon, 265.

3. If the possession of the defendant to real estate is of date anterior to the title under which the plaintiff claims, then and in that case the plaintiff can not recover unless he show a perfect title. 15 An. 454.

Patterson v. Litton, 274.

4. Prior to the act of 1847, the parish judge or his clerk could alone make a valid sale of succession property. C. C. 2600. Therefore a sale made of succession property prior to that date, by an auctioneer, conveyed no title whatever. *Ib.*

5. Defendant owed plaintiff \$8008. To secure this debt he sold to plaintiff three-fourths of his plantation, and gave his three notes, each for one-third of the debt, due at one, two and three years, with a stipulation in the agreement that if the debtor should promptly pay the notes at their maturity, the land was to revert to him again; but if he failed to pay the notes at maturity, then the right to recover back the plantation or the portion he had thus disposed of was forfeited. Held—That this transaction was a sale

SALE—Continued.

- with the right of redemption, and not a mortgage given by the debtor to secure the debt. *Carter v. Williams*, 231.
6. Where five parties own a tract of land in common, and all agree to sell and do sell and transfer it to one person, and the vendee gives his notes to each one for their respective shares of the land, and all the vendors join in the sale in one act, in which act of sale it is expressly stipulated that a mortgage is retained on the whole property as security for the payment of each one of the notes, and the vendee makes retrocession of four of the five shares of the tract of land to four of the vendors, then, and in that case, the third holder, before maturity, of the notes given to the fifth vendor for one-fifth interest in the land may enforce his mortgage rights against the whole tract of land first conveyed without reference to the retrocession. *Stewart v. Buard*, 411.
7. If it be stipulated in a contract that in case the obligation is discharged in United States treasury notes, it shall be in the proportion of one dollar and thirty cents in currency for every dollar expressed on the face of the obligation, the proper decree and judgment is to reserve to the maker of the notes the option to discharge the obligations in gold. A decree that the defendant be ordered to pay in currency with thirty per cent. additional is incorrect, because at the time of payment the price of gold might be less than thirty per cent. premium. *Ib.*
8. A promise to sell a lot of cotton is void as against an innocent third purchaser, to whom it was subsequently sold and delivered, if the price had not been paid and the cotton delivered before the second sale and delivery. *Meagher v. Reading*, 436.
9. In the sale of tobacco or other merchandise the *lex loci contractus* governs; therefore a contract of sale of a lot of tobacco in New York to a merchant residing in New Orleans, will be construed with reference to the laws and customs of that place which govern and regulate such transactions. *Harris v. Nasits*, 457.
10. It being shown to be the custom in New York among tobacco merchants, to close a transaction of the sale of a lot of tobacco at once and without reclamation, and it being shown in this case that that custom was observed, and that the purchaser examined the tobacco itself before purchasing, and having given his written acceptance in payment thereof, he could not be allowed thereafter to resist the payment of the draft given on the ground that the tobacco was unsound and worthless. *Ib.*
11. In a suit to recover the difference between the price agreed upon for the sale of a lot of cotton and the price which it actually brought (the first sale having failed of completion), the vendor must show that he complied with every requisite and condition on

SALE—Continued.

his part, and that the cause of the failure to complete the first sale was attributable entirely to the vendee, failing in which he can not recover the difference from the first vendee.

Moss v. Howard, 465.

12. An act of sale of real property under private signature takes effect against third persons only from the date of registry in the proper office and the delivery of the property. If, therefore, real estate has been sold under act by private signature, and the vendor remains in possession, and the act is not recorded, a third purchaser by public act acquires a good and valid title thereto, notwithstanding the former sale under private signature.

Morgan v. Kinnard, 645.

13. A judicial admission or allegation in the defense to the payment of notes given for the price of land that the defendant has no title, will not enable a third person, who gets possession of such land without title, to hold it under such judicial admission. The general rule is, however, well established that judicial confessions, when voluntarily made, are conclusive against the parties making them. *Ib.*

14. The price, the thing and the consent are essential elements of the *vente a remere* as well as of an unconditional sale.

Calderwood v. Calderwood, 657.

15. The right of redemption constitutes a resolutory and not a suspensive condition, and the purchaser, therefore, becomes at once proprietor, and can exercise all the rights of property, including the right of disposition. *Ib.*

16. The consent, which is the essence of the contract of sale, consists in the concurrence of the vendor's volition to sell a particular thing for a particular price, and of the vendee to purchase the same for the same price. When, therefore, J. C. made a contract with W. C. in the form of a sale of lands, but by a counter letter of even date it appeared (1) that the real intent of the parties was to secure the payment of a debt which remained unextinguished; (2), that the amount of the nominal price over and above this debt was not serious; (3), that the vendee, so-called, was not invested with the right of disposition; and (4), that there was really no consent of J. C. to sell or of W. C. to buy. Held—That the effect of the two instruments together was to constitute an *antichresis*, and not a *vente a remere*.

17. In the absence of the stipulation respecting interest permitted by R. C. C. 3180, the disposition of the revenues of the pledged immovable is governed by article 3176. Parol evidence is inadmissible against or beyond what is contained in the acts, and in regard to what may have been said before, at the time of, or after

SALE—Continued.

- their execution. Property in litigation can not be alienated to the prejudice of the claimant. *Ib.*
18. To constitute a sale there must be a consent to sell; that is, the vendor's volition to sell and the vendee's to buy must concur
Ware v. Morris, 666.
19. A document in the form of a sale, but shown by a counter letter to have been executed with no intention either on the part of one party to buy or of the other to sell, can not be a contract of sale. *Ib.*
20. It may be lawful to secure a debt by an instrument in the form of a contract of sale, but such an instrument is not in reality an act of sale, but of pledge or hypothecation. *Ib.*
21. Where such an hypothecary right merely exists, an action by the pretended vendee for the land can not be maintained, nor will the pretended vendor be estopped from showing the merely hypothecary character of the contract by the fact that he had gone into bankruptcy without surrendering the land on which the right had been granted. *Ib.*

SEQUESTRATION

1. To maintain a suit of sequestration of a lot of cotton or the proceeds thereof, on the ground of alleged ownership, it devolves on the party claiming to show a title at the time the sequestration was levied. A muniment of title, either of a negative or positive character, acquired subsequent to the sequestration, will not be admitted to bolster up a defective title, or supply the want of title at the time the sequestration was levied.
Yale v. Stevenson, 143.
2. The order of a constable of a justice's court, permitting a party to take possession of property which he holds under a writ of sequestration, is null and void, because the constable, as such, is vested with no judicial power whatever. Therefore, if the constable deliver to another the possession of property in his hands under a writ of sequestration, without an order from the justice who issued the writ, he is liable to the owner for the value thereof. In a suit by the owner to recover the value of property which has been illegally parted with, the constable can not be permitted to discharge his liability by returning it. He can only do so by paying its value.
Crane v. Quinn, 512.

SEPARATION OF PROPERTY.

1. In a suit by the wife who has been separated in property from her husband and authorized to administer her own affairs, by way of third opposition against the creditors of her husband, who have seized the crop as the property of her husband, it is incumbent upon her to establish the validity of her judgment of separation.

SEPARATION OF PROPERTY—Continued.

If she show, in answer to the objection that her judgment is invalid because her husband was solvent and had ample means to satisfy her demands after paying all his liabilities at the time her suit was brought, that his affairs were in a disordered and embarrassed condition, and that, after paying his debts he would have nothing left with which to satisfy her claims, then she will be held to have had the right to institute and prosecute her suit for a separation of property. If she show, in answer to the objection that her judgment of separation is null because she has not made proper efforts to enforce it, that she has caused repeated executions to issue thereon, and has realized but a small portion thereof, which has been credited on the judgment; that in addition to her proceedings by execution, she has taken in part payment, at a fair price, certain lots of ground belonging to her husband, which have also been credited on the judgment, then she will be held to have made proper efforts to enforce payment, and her judgment of separation of property will not be held to be void on that account.

Bird v. Duralde, 319.

2. The wife having established the validity of her claim, her right to institute and prosecute her suit for a separation, and having shown that she has made every possible effort to enforce her judgment, and having shown also that a large portion of the real estate belonged to and constituted her separate estate before her marriage, she must be held to be entitled to administer it, and to enjoy in her own right the crops made after the rendition of her judgment of separation of property from her husband *Ib.*
3. A confession of judgment by the wife on obligations which she has given jointly or *in solido* with her husband, in liquidation and settlement of the debts of the husband, is not binding on the wife. On the trial of a suit by the wife to annul a judgment which has been confessed by her, *in solido* with her husband, if the evidence shows that the parties were not separated in property, and that the husband was administering the estate of the wife as well as that of the community, and that the debts for which the wife confessed judgment *in solido* with her husband did not enure to her benefit or to the benefit of her separate estate, such judgment will be declared null and of no effect as against the wife.

E. S. Dancy, Wife, etc., v. Martin, Cobb & Co., 323.

SEE HUSBAND AND WIFE.

SCHOOL BOARD.

1. The assertion of a right to the same thing by another title and in a different capacity by the same parties, in a new suit, can not be construed as an acquiescence in the former judgment. Therefore the appeal which has been taken from the first judgment will not

SCHOOL BOARD—Continued.

be dismissed on motion because the same parties have brought another suit for the same thing under another title and in a different capacity.

Third Ward School District of New Orleans v. City Board of School Directors, 152.

2. The act of the General Assembly approved March 16, 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans," etc., gives to the ward boards of school directors for the city of New Orleans the primary control and direction of the public schools of the city. The city board of school directors for the city of New Orleans, created by the same act, are subordinate in their powers and functions to those of the ward boards; they are not, therefore, authorized under this act to make contracts with teachers, receive or disburse the school funds belonging to or coming to the city for school purposes, the ward boards alone being vested with this power under the act. *Ib.*
3. School directors of any parish, district or ward may be removed from office by the State Board of Education on charges of negligence, incompetency or violation of law, after a due hearing and fair trial. The removal of any director by telegram issued by the State Superintendent or the district superintendent, or by the order of either of them, is absolutely null and void. The Auditor of Public Accounts can not, therefore, refuse to issue warrants in favor of such directors for school moneys belonging to their district, on the grounds that he has been notified that they have been removed from office by the State Superintendent.

State of Louisiana ex rel. Board of School Directors, Parish of Bossier, v. Graham, Auditor, 716.

SEIZURE AND SALE.

1. A judgment creditor who has caused the seizure of a plantation can not be required to release his seizure because an injunction has been granted against the sale of one undivided half of the place. In such a case he may cause the other undivided half, not enjoined, to be sold, and if the sale is to be made with benefit of appraisement, the one-half of the estimated value of the entire property is the proper basis on which the sale should be made. If the sale be made in this way, the sheriff, on refusal, will be compelled by mandamus to make formal title to the one undivided half thus sold, and put the purchaser in possession thereof.

Losce v. Lacey, 287.

2. Machinery set in bricks and run by steam, and used as a cotton seed oil factory, constitutes a part of the realty on which it is erected. Such machinery can not, therefore, be removed from the premises after the land on which it stands has been seized under a mortgage.

Theurer v. Nautre, 749.

SEE JUDICIAL SALE.

SHERIFFS AND DEPUTIES.

1. The failure of the sheriff to return a writ of *feri facias* within the time fixed by law is presumptive proof of his liability for the debt, but this presumption may be overthrown by evidence going to show that he was authorized by the attorney of the seizing creditor to retain the writ in his hands. *Laforet v. Weber*, 253.
2. The fact that the owner of a drug store permitted a party, who was employed therein as a clerk, to manage its affairs for a share in the profits, to hold himself out to the world as the owner thereof, did not give a judgment creditor of such clerk on a debt which originated before he had any connection with the store as a clerk, the right to seize and sell the store as the property of the clerk, in satisfaction of the judgment against him individually.
Benner & Ranlett v. Michel and Gallaher, 489.
3. The sheriff and seizing creditor are liable, *in solido*, in case the sheriff has seized and sold the property of a third party, after being notified that such property was not that of the judgment debtor; and in fixing the amount of liability, the estimate placed on the property shortly before the seizure will be taken as a basis, rather than the vague appraisement made at the time of the sale.
Ib.

STATE COURTS.

1. Each State of the American Union must give the same effect, within its limits, to the judicial decrees of every other State, which such decrees have in the State where they are rendered. Constitution of the United States, article 4, section 1.
McLaren & Co. v. Kehler, 80.
2. Therefore a judgment, final and conclusive in the State in which it was rendered, is final and conclusive in this State, and a judgment without effect in the State in which it was rendered, is without effect here.
Ib.
3. The courts of the State in which a judgment of a court of another State is sought to be enforced, have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered. And in determining this question the courts of this State will require that the whole record of the proceedings be produced under which the judgment was obtained, in order to show how far it may be conclusive.
Ib.
4. If a judgment of the inferior jurisdiction of another State has been appealed, and the Supreme Court has pronounced a final judgment thereon, and the judgment or demand passed upon is sought to be enforced in this State, the record or proceedings of the Supreme Court, being the final judgment in the cause, is the proper transcript to present to enable the courts of this State to ascertain how far it is conclusive in the State where it was rendered.
Ib.

STATE COURTS—Continued.

5. If a case has been taken from the Supreme Court of Louisiana to the Supreme Court of the United States on a writ of error from a final decree, and the decree of the State court is reversed on the plea of prescription, and the cause is remanded by the Supreme Court of the United States to the State court, then and in that case the Supreme Court of the State will make order and decree in the case to conform to the ruling of the Supreme Court of the United States on the plea of prescription. *Stewart v. Bloom*, 748.

SUCCESSION.

1. A pew in a church, being attached to the realty, is of the character of an usufruct, and must be classed as an incorporeal immovable. C. C. 470. Notes given for the rent of real estate do not partake of the realty, and are therefore not to be classed as a part of the realty. Therefore, a legatee entitled to all the testator's estate, except real estate, will take the rent notes or their proceeds, while the legatee, entitled to the real estate, will take the pew in the church, that being classed as a part of the realty.
Succession of Gamble, 9.
2. Article 911 of the Civil Code, which provides that when the deceased has left neither lawful descendants nor lawful ascendants nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State does recognize the State as an heir, entitled to inherit, in the absence of all other heirs. Therefore the State, not being an heir under any circumstances, is not entitled to notice of the probating of a will, as provided in article 935 of the Code of Practice.
State v. Ames, 69.
3. An administrator who has admitted the correctness of debts against the succession he represents, will not afterward, on the trial of opposition to the tableaux he has filed, be permitted to allege or show, either in his individual capacity or as the representative of the succession, that the debts which he has admitted are incorrect. Therefore, his answer to oppositions filed by the creditors, in which he asks an amendment of the tableaux, on the ground that claims which he has admitted to be correct are incorrect, should not be permitted to be filed in the record.
Succession of Prudhomme, 228.
4. All successions must be opened and settled in the parish courts. Therefore, if an account and tableaux, made out and filed by the administrator in the parish court, be opposed by the creditors, such oppositions can only be disposed of by the parish court, irrespective of the amount involved. *Ib.*
5. Representation is a fiction of law, which places the representative in the position, degree and rights of the person he represents.

SUCCESSION—Continued.

The representative of the deceased does not receive by transmission from the person he represents, but he is endowed by the law with the rights to the succession of such person. He is not, therefore, by the fact of representation merely, rendered personally liable for the debts of the person whom he represents.

Succession of Morgan, 290.

6. Where parties have died, leaving a succession which falls exclusively to the collateral heirs, there being no heirs in the direct line, either ascending or descending, and one of the branches of the collateral line claims by representation, such representative branch can not be compelled to collate a debt which their ancestor owed to the deceased, nor are they bound to collate gifts made by the deceased to their ancestors. C. C. 1313. *Ib.*
7. The heir becomes seized of the succession by operation of law from the moment that it is opened by the death of the ancestors, and before taking any steps to put himself in possession, or expressing a willingness to accept, and even though ignorant that the succession has been opened in his favor. Prescription is therefore suspended by the fact of minority from the date that the succession falls to the heir until his majority.

Beckham v. Henderson, 446.

8. If the court has jurisdiction, the informalities prior to a decree of sale of succession property are cured, and the purchaser is protected against such irregularities. But if property be sold under such decree that belongs to another, and does not belong to the succession, then and in that case the owner of such property can not be precluded from showing the facts and recovering his own. *Ib.*
9. In this case the evidence shows that E. H. Dickson, the administrator, sold a crop of cotton in 1859, belonging to the estate he represented, and placed the proceeds thereof in the hands of his commission merchants, Hawkins & Norwood, of New Orleans; that he was an heir of the estate; that the other heirs were made aware of the fact, and made no objection thereto; that soon after the death of the administrator Hawkins & Norwood failed; that the heirs took no steps to get the proceeds of the sale of the cotton after the death of the administrator, and before the failure of the commission merchants, Hawkins & Norwood. Held—That under this state of facts the heirs could not recover from the estate of the administrator the amount of the proceeds of the sale of cotton belonging to the estate he represented, which had been placed by him in the hands of the commission merchants, Hawkins & Norwood, who had subsequently failed, because the money was placed there with the knowledge of the heirs, who made no objection

SUCCESSION—Continued.

- thereto, and because no misconduct on the part of the administrator was shown. *Dickson v. Dickson*, 583.
10. The purchaser of real property at a succession sale, during the late war, is protected in his title and ownership thereto by the provisions of article 149 of the Constitution of 1868, if it appear that all the proceedings in regard to the sale of the property were upon their face regular. *Allen v. Cutliff*, 614.
11. The duty imposed on curators of vacant estates by article 1134, R. C. C., of making publication in two newspapers in the city of New Orleans of the death, the name, surname, place of birth and death of the deceased, whose succession he administers, does not apply to or affect the right of the heirs to be recognized as such. If, therefore, this duty is omitted or neglected by the curator, the heirs may still be recognized by complying with the requirements of the law in such cases. *Mayo v. Duke*, 674.
12. In an action of partition commenced by the heirs, one citation addressed to the surviving wife, in her individual capacity and as natural tutrix of her minor children, is sufficient. In such a case there is not such a confliction of interest as requires the interposition of the under tutor. *Emmer v. Kelly*, 763.
13. The tutor or tutrix is the proper party to invoke a family meeting for the purpose of deliberating on the question of a judicial partition where minors are interested. *Ib.*

TAXES AND TAX SALES.

1. After the tax collector has made out and returned into the proper office the delinquent list, in compliance with law, the title to lands included in such list becomes vested in the State, subject to the right of the parties interested to redeem it as provided by law. After the delinquent list has been thus returned, the authority of the tax collector ceases, and he can not thereafter be made a party, nor is he competent to represent the State in a suit or proceeding by the vendor against the purchaser to compel a settlement of the taxes due on lands. *Hall v. Hall*, 135.
2. The free banking law of the State which exempts banks organized under its provisions from the payment of a license, does not exempt such banks from the imposition of a tax on capital. On the contrary, the statute expressly provides for such a tax *State of Louisiana v. Mechanics' and Traders' Bank*, 307.
3. A tax payer who fails to make complaint of excessive valuation within the time allowed by law for that purpose, can not afterward be heard unless he first show some valid reason for not having made such effort; second, he must show some grave error to his prejudice; and third, its precise amount, failing in which, judgment will be given against him for the amount of the assessment.

Ib

TAXES AND TAX SALES—Continued.

4. The proceeding authorized by act No. 69, of 1869, against a parish, to compel the properly constituted authorities to levy and collect a tax to pay for work that has been done for the parish, under contract with the police jury, is a proceeding in the nature of a mandamus to compel the officers of the parish to do what is required of them by law. The statute does not impose upon the court the burden of levying a tax, but simply authorizes it to render judgment for the amount found to be due, and to order the proper authorities to levy and collect the tax necessary for its payment. The act is not therefore obnoxious to the provisions of the Constitution on the subject of taxation.

Benjamin v. Parish of East Baton Rouge, 329.

5. Section seven of the revenue law of 1871 prohibits all cities and municipal corporations in the State from levying a tax for any purpose, in any year, in excess of two per centum on the assessed value of all property therein listed for taxation. It being shown that the Council of the city of New Orleans has already levied a tax in excess of two per centum on the taxable property within the city limits. Held—That under the prohibition contained in the act above recited, the city could not be compelled by writ of mandamus to levy an additional tax for school purposes, although the General Assembly had by special act directed that the Council should levy a tax for such purpose.

State ex rel. Board of School Directors v. Mayor and Administrators, 358.

6. The written promise to accept an existing bill is an absolute acceptance which is binding on the party who makes it; therefore, if a party promise in writing to accept drafts drawn upon him by the collector of internal revenue for the amount of taxes imposed upon him on account of cotton received, he is bound on such drafts, and can not be heard to urge that the laws of the United States prohibit tax collectors from collecting taxes in anything but lawful money. Nor can he be allowed to urge that no one but the United States is entitled to recover. *Cook v. Miltenberger*, 375.

7. The burden of the taxes and charges on real estate falls on the lessor, and not on the lessee. If, therefore, the property is exempt from taxation in the hands of the lessor, no taxes can be imposed thereon against the lessee.

State v. Campbell, 445.

8. A purchaser of real property at forced sale can not be required to pay back the taxes which have accrued and are standing against it of date prior to the sale. The sheriff has not the right, therefore, to pay such taxes out of the purchase price, and thereby reduce the amount to be credited on the *fieri facias* to that extent.

De St. Romes v. Macarty, 482.

TAXES AND TAX SALES—Continued.

9. A tax that has been imposed after the law which authorized it has been repealed, is void and of no effect.

Abbott v. Britton & Koontz, 511.

10. After the passage of the act of the twenty-ninth of September, 1868, creating the parish of Richland, the people living within the limits of that portion of the new parish which was detached from the parish of Morehouse, were required to pay the taxes due by them to the authorities of the parish of Richland. This act being valid, the parish of Morehouse had no right to collect taxes thereafter from the people thus detached.

Parish of Morehouse v. Parish of Richland, 648.

11. The acts of 1853 and 1855, re-enacted in section 3344 of the Revised Statutes of 1870, "which prohibits the levying any tax by any municipal corporation in the State on persons engaged in selling articles of their own manufacture, manufactured within the State," is not repealed or modified by the charter of the city of New Orleans enacted in 1870. The doctrine announced in *City of New Orleans v. Lusse & Rhulman*, 21 An. 1, is reaffirmed by this decision.

Honold v. City of New Orleans, 726.

12. The burden falls on a tax payer, who aims to go behind the assessment roll, of showing that he applied to have it corrected within the time allowed by law. *City of New Orleans v. Walker*, 781

TRANSACTION.

1. The rule which gives to a transaction the authority of the thing adjudged is founded upon the maxim that it is for the interest of the commonwealth that there should be an end of litigation.

Rabun v. Pierson, 696.

2. A transaction settling the amount due upon notes given for the price of land, movables and slaves, and appearing to have eliminated the slave portion of the consideration, will not be disturbed because the calculations by which such elimination was effected were not exactly accurate, no error of calculation being pleaded

Ib.

3. A transaction fixing the amount due by the debtor at a date certain necessarily excluded testimony offered by him to prove a part payment made two years before such transaction. *Ib.*

4. A compromise between a creditor and his debtor, whereby the creditor agrees to take a less amount than is due in payment of his demand, provided the debtor makes payment within a given time, is terminated if the debtor fails to make the payments within the time specified in the compromise.

Barrett v. Hard, 712.

5. If a suit or litigation be settled by compromise, no one of the parties to the litigation can, after recovering the portion allotted to him by the settlement, be permitted to deny his sanction to the agreement.

Stewart v. Haas, 783.

TUTORS AND TUTORSHIP

1. A tutor is not entitled to charge the estate of his wards with board if it be shown that they, the minors, were rendering him service in his house in attending to his household affairs, during the time he had them under his charge, to an amount sufficient to compensate him for their board. *Succession of Gross*, 105
2. Private books kept by the tutor of amounts of money furnished and given to his wards, do not make proof in behalf of the tutor who has kept them. C. C. 2249. *Ib.*
3. A tutor who has property of his wards under his charge which yields a revenue, is personally liable if he fails to collect the rent as it becomes due. The tutor also owes five per cent. per annum on all sums of money in his hands belonging to his wards which he has failed to invest. Sec 3826, Revised Statutes of 1870. *Ib.*
4. The tutor is entitled to charge ten per cent. on the amount of the revenues of his wards as a commission for administering their estate. *Ib.*
5. The absence of the under tutor at a family meeting convoked for the purpose of recommending the appointment of a tutor, if the evidence shows that he was duly summoned to attend, furnishes no ground for the under tutor to annul the judgment appointing a tutor under the recommendation of the family meeting.
Osborn v. Rogers, 167.
6. If the tutor has failed to have an inventory of the minor's property made, and has omitted to have the mortgage in favor of the minor on the property of his tutor recorded so that it will be preserved, the tutor may be dismissed from office at the suit of the under tutor. In a suit by the under tutor to dismiss the tutor from office for neglect of duty, the tutor can not be heard to urge in his defense that it was the duty of the under tutor to have the bond of the tutor recorded; in order that the minor's mortgage might be preserved on his, the tutor's property. *Boykin v. Hill*, 565.
7. If the property of the minor has been seized by a judgment creditor of the tutor in his individual capacity as the tutor's individual property, the tutor is the proper party to enjoin the sale thereof in behalf of the minor. If, however, the question of the validity of the minor's title to the property becomes the subject of adjudication, then the under tutor is the proper party to bring the suit.
McEnery v. Letchford, 617
8. Where the title to property is ostensibly in the minors, a judgment creditor of the tutor in his individual capacity can not maintain a seizure thereof on the ground that the tutor is in possession, unless he allege that the title of the minors is simulated. In such a case the judgment creditor must first resort to a revocatory action.

Ib

TUTORS AND TUTORSHIP—Continued.

9. In this case the facts show that the tutor of the minors purchased a piece of property in the town of Shreveport in the name of the minors he represented; that he was much indebted at the time, and that the heirs he represented had no means of their own which were available at the time; that at his death the lands or lots were inventoried as his property and sold at his succession sale. This action is brought by the heirs (since become of age) for the recovery of the lands or lots purchased by their tutor in their name. The defense of the purchasers at the succession sale of the tutor is that the title to the heirs by the tutor is a fraudulent simulation. Held—That under this state of facts, and under the ruling in the case of *Frazer v. Prichard*, 6 An. 728, the purchasers at the succession sale had the right to allege and show the simulation.

Stewart v. Looney, 624.

WALL IN COMMON.

1. A party who makes a wall that has been constructed by the adjoining proprietor, one in common, contracts the obligation to pay the party who erected it one-half of the original cost thereof. This obligation to pay one-half its costs is not affected by the fact that the party who makes it one in common is the owner of more than one-half of the soil on which it is built. 14 An. 338; 20 An. 554; 22 An. 114. *Marion v. Johnson*, 597.
2. A party who, by his own act, has made a wall that has been built between himself and his neighbor, one in common, can not thereafter put any additional wall, or put an iron front to his building, which extends beyond the centre of such wall. Any attempt to do so will be restrained by an injunction, and the party thus attempting will be considered a trespasser, and will be condemned to pay the damages caused to the wall in common, with vindictive damages for the tort. R. C. C. 676. *Ib*

WARRANTY.

1. The right to call a third party in warranty is conferred only upon the defendant in the action, and the judgment in warranty is dependent entirely on the judgment against the defendant in the main action. C. P. 362. *Burbridge v. Andrus*, 554.
2. The holder of a promissory note indorsed in blank can not, therefore, proceed against the indorser as a warrantor. *Ib*.

WILLS.

1. Article 911 of the Civil Code, which provides that, when the deceased has left neither lawful descendants nor lawful ascendants nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, does recognize the State as an heir, entitled to inherit, in

WILLS—Continued.

the absence of all other heirs. Therefore the State, not being an heir under any circumstances, is not entitled to notice of the probating of a will, as provided in article 935 of the Code of Practice.

State v. Ames, 69.

2. In considering the question of the authenticity of an olographic will, courts will not give effect to the novelty of the testator in the selection of the place of deposit of the paper containing his last will, nor to the whims and vagaries in the dispositions of the last will and testament. But, on the contrary, they will look to the evidence tending to establish its genuineness, and if the document produced is shown by the evidence to be the last will and testament of the deceased, it will be so held, notwithstanding the circumstances surrounding its discovery, and the dispositions thereof may reasonably excite suspicion of its being the veritable act of the testator. *Ib.*

3. If the loss or destruction of an olographic will or a sealed letter, which it is claimed is a part of the will, be shown, the legatee claiming under the will or the sealed letter, may establish either the contents of the will or the sealed letter, so lost or destroyed, by secondary evidence. And if it be alleged and shown by the legatee, who claims under the sealed letter, that the universal legatee under the will, into whose possession the sealed letter came, fraudulently concealed, or destroyed it, then, and in that case, the court will apply, in favor of the party claiming under the sealed letter as a part of the will thus lost or destroyed and against the spoliator, the maxim, *omnia præsumentur contra spoliatorem*. But this rule will not be applied unless the evidence makes it certain that the universal legatee, into whose possession the sealed letter came, concealed or destroyed it for the purpose of defeating its bequests. *Lucas v. Brooks, 117.*

4. Where a sealed letter, which accompanied the will, has been lost or destroyed, which sealed letter it is claimed constituted a part of the will, is sought to be established by secondary evidence as forming a part of the will, which has been admitted to probate, all the evidence necessary to establish the validity of an olographic will must be produced. The signature of the sealed letter, claimed to be a part of the will, must be proved in the same manner and by the same kind of testimony that are required to prove the signature to the will itself. If the evidence and presumptions in the record are sufficient to establish that the sealed letter was written and dated by the testator, this fact, coupled with the presumption that men generally sign all letters written by them, is not sufficient to justify the court in concluding that the sealed letter, claimed to be a part of the will, was signed by the testator. *Ib.*

WILLS—Continued.

5. To give effect to a testament made in another State of the Union, on property situated in this State, the testament must be registered and its execution ordered by the judge having jurisdiction over the place where the property is situated. C. C. 1688-9.

Dixon v. D'Armond, 200.

6. The order of the judge admitting a will made in another State to registry and directing its execution, necessarily vacates the former order of the same judge appointing an administrator to take charge of the property situated in this State. *Ib.*

7. The parish court has jurisdiction of a question involving the validity of a will and the recognition of the party claiming as heir, without reference to the amount involved. In this case the evidence shows that no witnesses that could be had at the time of making the will resided in the place; that a greater number than five, who subscribed to the will, could not have been procured without endangering the execution of the will itself, on account of the critical condition of the testator at the time. Held—That under these circumstances the attestation of the will by five witnesses was a substantial compliance with article 1576 of the Civil Code, and that the will was not void on account of its not being attested by a greater number of witnesses.

Kilbourn v. Pennebaker, 700.

WITNESSES.

1. The wife is a competent witness to testify in a suit brought by a creditor of the husband to annul a judgment of separation of property between the husband and wife. *Keller v. Vernon*, 164.
2. The correctness of a judgment of separation of property may (when attacked by a creditor of the husband) be established by evidence *aliunde*. Therefore, evidence tending to show that the husband received from the wife funds derived by succession from the estate of one of her deceased relatives, prior to her judgment of separation, is admissible to establish the validity of her judgment in a suit by the creditor to annul it. *Ib.*
3. What a deceased witness testified on a former trial in a criminal case may be proved by a witness who was present and heard the deceased witness testify. The witness giving evidence of what the deceased witness testified to on a former trial, must, however, give his evidence from his own recollection. If the witness who heard the deceased witness testify on the former trial be the attorney of the accused on both trials, the State, nevertheless, has the right to have his testimony on this point, his recollection of all the important facts testified to by the deceased witness in favor of his client being presumed. *State v. Cook*, 347.

WITNESSES—Continued.

Where the plaintiff and defendant both testify in the case, and that given by the one contradicts that of the other, judgment will be given in favor of the party having the preponderance of evidence, without reference to the testimony of the parties to the suit.

Christen v. Keiffer, 501.

5. The husband is not a competent witness to testify on the trial of an injunction suit in which the wife is plaintiff, because his testimony must be either for or against his wife. C. C. 2281.

McDonald v. Thompson, 556.

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